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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

VAN GESSNER,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

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MARION R. BIGGS,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

1370

JOHN NEWTON WILLIAMSON,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

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BRIEF OF PLAINTIFFS IN ERROR ON APPEAL.

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BRIEF OF PLAINTIFFS IN ERROR ON APPEAL.

The above cases were tried in the Court below upon an indictment charging the defendants jointly with the crime of conspiracy to suborn perjury. Separate judgments were entered

against each of the defendants and each of them has appealed separately to this court. As all were tried together upon the same indictment, the questions presented are identical and it is stipulated by plaintiffs and defendant in error that they may be heard together upon the same brief and argument.

Prior to the writ of error in this case the defendant Williamson, who was a representative in Congress, had sued out a writ of error to the Supreme Court of the United States, based upon the holding of that court in the Burton Case, that a sentence of imprisonment against a member of Congress involved a constitutional question, giving the right of appeal direct to that Court. At the time the writ of error was sued out in this case the constitutional question in the Burton Case had never been decided. This writ of error to this Court in the Williamson Case was sued out after the writ to the Supreme Court, and out of abundance of caution in case the writ to the United States Supreme Court should be dismissed upon jurisdictional grounds.

The jurisdiction of this Court, therefore, in the Williamson Case depends upon whether the United States Supreme Court shall entertain jurisdiction thereof and if it holds that it has jurisdiction to pass upon the merits, then the proceeding in this Court necessarily fails. If the Supreme Court should take jurisdiction in the Williamson Case and pass upon the merits, its decision will necessarily be controlling in all these cases, as the record and questions presented (except the constitutional one) are identical.

THE INDICTMENT INSUFFICIENT.

The indictment in the case attempts to charge the defendants with the crime of conspiracy to suborn perjury in the mat-

ter of applications for the purchase of timber lands under the Acts of Congress approved June 3rd, 1878, and August 4th, 1892, as found on pages 1545 and 1546, Vol. II, of the United States Compiled Statutes 1901. The indictment is very much involved and its allegations are exceedingly vague and uncertain as to the purpose of the alleged conspiracy and the character of the proceeding in which it was to be committed—so much so that the different judges before whom the case was tried (the jury twice disagreed) gave it entirely different constructions, Judge De Haven holding that it applied to the original application or filing only and Judge Hunt holding that it applied to the final proof.

It does not describe the lands which are claimed to have been the subject of the conspiracy, or state their amount or location (except that they are in Crook County, Oregon), neither does it in any way name or designate the persons who were to be suborned nor state they were unknown to the grand jury; the language in these regards being to "suborn, instigate and procure a large number of persons, to-wit, one hundred persons, to state and subscribe upon their oaths that *certain* public lands of the United States, lying in Crook County in said District of Oregon."

So the indictment did not allege that the conspiracy charged involved the intention on the part of the conspirators to do all the things necessary to be done to constitute subornation of perjury, and particularly in this: It is not alleged that the defendants as a part of the alleged conspiracy intended or contemplated that any one should swear to any matter which the conspiracy itself contemplated should be false.

It is not charged that the conspirators during the conspiracy

and as a part of it knew that they would in the future know that the matters to be sworn to by the persons to be suborned would be false. The contention on the part of the plaintiffs in error is that the two allegations contained in the indictment, concerning their knowledge of the falsity of the matter to be sworn to, attributes knowledge to them at some time in the future after the formation of the conspiracy, without any allegation that the defendants themselves as a part of the conspiracy, contemplated or knew that they would have any such future knowledge of the falsity of the matter to be sworn to.

Neither is it alleged in the indictment that the conspiracy involved the intention that the persons to be procured should willfully and corruptly take a false oath, or that the persons to be procured should knowingly and corruptly swear to that which was false.

There is nothing in this indictment which charges that the persons to be suborned were to subscribe the affidavits, etc., that they might swear to or that the same should be transmitted to the Register and Receiver of the local land office, when in order to be of any effect they must be so transmitted.

These questions were raised by demurrer and by motions in arrest of judgment and are presented in assignment of errors No. One, 135, 136.

INDICTMENT CHARGES PERJURY IN ORIGINAL APPLICATION. PROOF ADMITTED AS TO CONTENDED PERJURY IN FINAL PROOF.

It is the contention of the plaintiffs in error that if the indictment charges anything with such reasonable certainy as to inform the defendants of the charge against them, it is that the alleged perjury was committed in the matter of the *original*

application to purchase which is required by Section 2 of the above mentioned act. The statement which is alleged to have been falsely subscribed by them and which is the basis of the alleged perjury, being described as stating that the lands "were not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the own exclusive use and benefit"*of those persons respectively*, and that they "had not directly or indirectly made any agreement or contract in any way or manner with any other person or persons whomsoever, by which the titles which they might acquire from the said United States in and to said lands should inure in whole or in part to the benefit of any person except himself" and this is the identical language of the original statement or application required by and Section 2. This was, as we understand it, the holding of Judge De Haven at the first trials, but at the last trial the prosecution was permitted to offer evidence of perjury in the final proof and the jury over the objection and protest of the defendants were permitted to base a conviction substantively thereon. This question was raised by objection to the evidence and by request for instruction which was refused and by exception to the instructions given and is covered by Assignments of Error Nos. 9, 10, 15, 22, 43, 101, 104, 131.

VARIANCE AS TO SCOPE OF AGREEMENT.

This not being a charge of actual subornation of perjury, but of an unexecuted conspiracy to suborn, it is contended by plainiffs in error that the unlawful plan or agreement becomes itself the substantive element of the charge and must be proved substantially as laid. The plan or conspiracy alleged was general in its character to suborn "a *large number of persons*, to-wit, *one hundred persons* to commit the offense of perjury,

etc." This was altogether a different thing from a plan to suborn one or two definite individuals—yet the prosecution was permitted to go to the jury on the theory that proof of a conspiracy to suborn one or two persons only, was sufficient to sustain a conviction.

This question was raised by a request to instruct the jury as follows:

The charge in the indictment is that there was an agreement between the defendants general in its character to suborn *a large number of persons* to commit perjury. An agreement to suborn one or two persons only would not sustain the indictment even if it were proven," and by an exception to its refusal. It is also raised by an exception to a part of the charge given by the Court which implied to the contrary. These questions are covered by Assignments No. 121 and No. 105.

ADMISSION OF EVIDENCE AS TO SECRET INTENTION OF APPLICANTS.

The prosecution made witnesses of the different applicants and was permitted to ask each of them what was "his intention" as to the disposal of the land at the time he filed—made final proof, etc. It was and is claimed by defendants, that, as this was a charge of prior conspiracy to suborn these applicants rather than actual perjury, the secret and undisclosed intentions of these applicants were not admissible or competent as against these defendants and this question was raised by suitable objections at the time of the admission of the evidence and is presented here by assignments of error No. 2, 3, 7, 8, 12, 13, 17, 19, 20, 21, etc.

EVIDENCE AS TO ALLEGED FALSITY IN APPLICATION OF DEFENDANTS BIGGS AND WILLIAMSON AS TO LAND TAKEN BY THEM BEING MOST VALUABLE FOR TIMBER.

After introducing in evidence the sworn statements of these defendants Biggs and Williamson stating that the land taken by them was most valuable for its timber, the prosecution were permitted over the objectoin of defendants to go at length into the character of the timber on these claims and offer evidence tending to show that the timber thereon was of comparatively little value and that it was more valuable for other purposes.

It was and is contended by the defendants that this testimony was inadmissible both because the defendants were charged with a conspiracy to suborn others, not to commit perjury themselves, and because there was no charge in the indictment of proposed falsity in the matter of the character of the lands—the indictment on the contrary alleging that the lands *were* subject to entry under the timber law. This question was raised by objection to the evidence. See assignments No. 32, 33, 35, 37, 39, and by request for instruction assignment No. 129.

EVIDENCE AS TO ALLEGED FALSITY IN THE APPLICATIONS OF THE VARIOUS PERSONS THAT THE INDICTMENT ALLEGES PLAINTIFFS IN ERROR WERE TO SUBORN, TOUCHING THE QUESTION OF WHETHER THE LAND APPLIED FOR WAS MORE VALUABLE FOR TIMBER OR OTHER PURPOSES.

Over the objection and exception of the plaintiffs in error the government was allowed to introduce evidence tending to

show that the timber was of comparative small value upon the land applied for by the various entrymen whom it was alleged plaintiffs in error conspired to suborn.

The evidence introduced on this question bore upon the truth of the statement contained in the various sworn statements and final proofs introduced in evidence. Evidence was introduced on this point tending to show that most if not all of the land described in the indictment wherein the alleged overt acts of Biggs are set out was of little value for timber and the plaintiffs in error contend that such testimony was inadmissible inasmuch as the indictment charged that the land was subject to entry under the timber and stone act, and that each of the persons mentioned in the valious alleged overt acts of Biggs was a person to be suborned. It is contended by plaintiffs in error that under the indictment the proceeding in which perjury was to be suborned were those wherein land chiefly valuable for its timber was being applied for. The question was raised by objections and exceptions to the testimony introduced tending to show that the land was of little value for timber, and by requests made the Court to charge the jury and is presented in assignments of error numbered 34, 35, 36, 37, 38, 39, 40, 41, 89, 94, 125,127 and 128.

THE ADMISSION OF EVIDENCE OF OTHER OFFENSES.

At the trial of the cause the Court permitted the prosecution to offer evidence tending to show that two of the defendants, Van Gesner and Williamson, had obtained land unlawfully from the State of Oregon and tending to show that defendant Van Gesner had induced one Mary W. Swearingen and his sis-

ter, Mrs. Gerowe, to purchase land from the State of Oregon for the benefit of said Williamson and Van Gesner and to commit perjury in the purchase of the land and also to offer evidence tending to show that said defendant Van Gesner had attempted to induce a Mr. Perry to make like purchase for their benefit.

These matters the prosecution were permitted to go into *in detail.*

The testimony was put in as rebuttal testimony and defend- Van Gesner was called for *re-cross-examination* in the matter after the defendants had rested their case and the prosecution had entered upon its rebuttal and for the ostensible purpose of laying a foundation for the impeachment of Van Gesner. Prior to this cross-examination said defendant had not testified at all in relation to the school land matters. The question was raised by objections to the testimony as incompetent and imaterial and tending to prejudice defendant by collateral matters and to the recall of the defendant for further cross-examination after close of defendant's case and also by objections to the questions as not proper cross-examination and also by objections to the testimony as to these transactions offered in rebuttal as not proper rebuttal and not proper impeaching questions and upon the ground that no sufficient foundation for the impeaching questions had been land. These questions are presented in assignments of error Nos. 53, 54, 66, 67, 68, 69, 70, 71, 72, 72a, 73, 74, 75, 76, 77, 78, 79, 80, 81, 95.

ERROR AS TO INSTRUCTIONS.

At the proper time the defendants asked the court to instruct the jury as follows: "Even if you should find that some one of the defendants intended to suborn perjury or even actual-

ly did so, this would not justify a conviction of the charge in this indictment unless you further find that two or more of these defendans, definitely planned and agreed among themselves to procure the alleged perjury." And again, "Even if you find that perjury was committed by some one or more of the applicants in question that would not justify a verdict of guilty unless you further find that at least two of the defendants conspired or agreed together to procure the perjury to be committed." And again, "The defendants are not charged with defrauding or attempting to defraud the government and therefore any mere attempt to evade the law on their part (if there was any such attempt) would not justify a verdict of guilty unless there was actually an agreement and conspiracy among themselves to procure perjury." But the Court refused to give each of the instructions and the questions presented thereby are presented by the exceptions to such refusal, and are covered by Assignments of Error Nos. 110, 111 and 112.

THE JURY SHOULD NOT HAVE BEEN PERMITTED TO BASE THEIR VERDICT UPON ANY FALSITY NOT CHARGED IN THE INDICTMENT.

This question was presented by the following instructions, which were requested by the defendants: "The charge in this indictment is that the oaths of the applicants in question were intended to be false in the matter of he alleged contract to convey to Van Gesner and Williamson and you must base your findings on that charge alone." And again, "*there is no charge in the indictment that the alleged oaths the applicants were to take were false as to he character of the land or, as to the manner of obtaining the money with which to pay for it.*" And again "*even if you should believe therefore that the applicant or some*

(The following was accidentally omitted from the statement of the case by the printer:)

IMPEACHMENT OF WITNESS BRANTON.

One Branton was an important witness for the defense. He testified that he was present at the time of the alleged arrangement between Van Gesner and a large number of the applicants and heard the talk and that Van Gesner did not agree to purchase the land, but on the contrary, refused to make any agreement; that Dr. Gesner was asged by one of the applicants if he would buy the claim and Dr. Gesner stated "that he could not buy them, he could not make a contract at all, and further said you can't sell them and went ahead to give his reasons for it." That "he said he had legal advice on the matter and he was told that he conld not make any contract at all." Etc. etc.

On cross-examination he was asked in relation to certain conversations at a place called the Adams Ranch, a few days before the talk between the applicants and Van Gesner referred to, and was asked where he was going at this time when he was at the Adams ranch, and he ansdered that he was going to Vale, which is in the Eastern part of the State of Oregon.

The prosecution was then permitted to ask him if he did not state to different parties at that time that he was going to *Idaho*, and to impeach him by calling witnesses to prove that he had stated at that time that he was going to the latter place.

The question was raised by proper objections to this evidence and the question is whether or not you may impeach and discredit a witness by proving alleged contradictory statements *in relation to a collateral matter in no way material to the case under consideration.*

There was also an attempt to impeach this witness by evidence tending to show that he had said to different persons that the reason why he didn't take a timber claim was because there was not enough in it. This declaration if made was probably proper matter of impeachment, but our contention in that regard is, that there was no sufficient foundation laid by asking the witness as to time, place and persons present.

of them were inaccurate or testified falsely as to where or how they obtained the money to prove up on their claims, that alone would not be sufficient to sustain a verdict of guilty in this cause." These instructions were refused and the questions are presented by exceptions to the separate refusal of each. They are covered by the 124th, 125th and 126th assignments of error.

INSTRUCTIONS AS TO OVERT ACT.

The Court charged the jury as follows: "The offense is sufficiently proved if the jury is satisfied from the evidence, beyond a reasonable doubt, that two or more of the parties charged, in any manner or through any contrivance positively or tacitly came to a mutual understanding to accomplish a common and unlawful design, followed by *some act* done by *any one of the parties* for the purpose of carrying ito int execution."

It was and is the contention of the defendants that this instruction should have been limited to the overt act charged in the indictment and also to the acts of defendant Biggs *who was the only person charged in the indictment to have committed any overt act.* The question is presented by proper exception to the instruction and is the 97th assignment of error.

THE FOLLOWING IS A SPECIFICATION OF THE ERRORS RELIED UPON BY THE PLAINTIFFS IN ERROR:

First. The said Circuit Court erred in overruling the demurrer of the said defendant Van Gesner to the indictment filed in said cause, demurring to said indictment upon the ground that it and the matters and facts therein contained, in the manner and form the same are stated, are not sufficient in law, and

are not sufficient to constitute a crime, and that said indictment is not direct and certain as to the crime charged, or the particular circumstances of the crime; and that it does not set forth the name or identity of the persons defendants, or charged with having conspired to suborn, and does not describe or identify the perjury which is alleged to have been suborned, instigated and procured, or the land as to which said perjury was committed.

SECOND. In overruling the objection of said defendant to the question asked witness Ben Jones.

Q. Now, at the time you signed and swore to it did you intend to convey this land to Dr. Gesner for the consideration named by him to, as testified by you, as soon as you obtained the title thereto?

And in permitting the witness to answer the same.

A. Yes, sir.

THIRD. In overruling the objection of the said defendant to the question asked of witness Ben Jones.

Q. Mr. Jones, at the time you subscribed this final proof paper, what was your intention with reference to this land as to what you would do with it when you obtained the title?

And in permitting the witness to answer the same.

A. Let Gesner have it.

FOURTH. In overruling the objection of the said defendant to the question asked of witness Green Beard.

Q. At the time you appeared before him to file did you sign these two papers (showing witness sworn statement or applications).

And in permitting the witness to answer the same.

A. They look very much like the papers I signed.

SEVENTH. In overruling the objection of the said defendant to the question asked of Green Beard.

Q. At the time you signed these papers what was your intention as to what you would do with the land when you obtained title to it?

And in permitting the witness to answer the same.

A. Why the land was to go—the land was to be turned over to Williamson and Gesner.

EIGHTH. In overruling the objection of the said defendant to the question asked of the witness John F. Watkins.

Q. What was your intention at the time you signed this, as to what you would do with the land, if anything, when you got it?

And in permitting the witness to answer the same.

A. I intended to convey it to that Company, Williamson & Gesner.

NINTH. In admitting over the objection of the said defendant the final proof papers of the witness John F. Watkins, as follows:

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TIMBER AND STONE LANDS.

Testimony of Claimant.

John S. Watkins being called as a witness in support of his application to purchase the N. E. 1-4 of Sec. 24, Township 15 South, of Range 19, East W. M., testifies as follows:

Question 1. What is your age, postoffice address and where do you reside?

Answer. 43, Prineville, Ore., Crook Co., Ore.

Question 2. Are you a native born citizen of the United States, and if so, in what state or territory were you born?

Ans. Yes, in Oregon.

Ques. 3. Are you the identical person who applied to purchase this land on the 21st day of July, 1902, and made the sworn statement assigned by law before the Register (or Receiver) or United States Commissioner, on that day?

Ans. Yes.

Ques. 4. Are you acquainted with the land above described by personal inspection of each of its smallest legal subdivisions?

Ans. Yes.

Ques. 5. When and in what manner was such inspection made?

Ans. In July, 1902; personal inspection.

Ques. 6. Is the land occupied; or are there any improvements on it not made for ditch or canal purposes, or which were not made by or do not belong to you?

Ans. No.

Ques. 7. Is the land fit for cultivation, or would it be fit for cultivation if the timber were removed?

Ans. No.

Ques. 8. What is the situation of this land, and what is the nature of the soil, and what causes render the land unfit for cultivation?

Ans. Hilly, rough and rocky, and the soil is not fit for cultivation.

Ques. 9. Are there any salines, or indications of deposit of gold, silver, cinnibar, copper, or coal on this land? If so, state what they are, and whether the springs or mineral deposits are valuable?

Ans. No.

Ques. 10. Is the land more valuable for mineral or any other purposes than for the timber and stone thereon, or is it chiefly valuable for timber or stone?

Ans. Timber.

Ques. 11. From what facts do you conclude that the land is chiefly valuable for timber or stone?

Ans. It is rough, hilly and rocky and is covered with ordinary good timber.

Ques. 12. What is the estimated market value of the timber standing upon this land?

Ans. About $800.00.

Ques. 13. Have you sold or transferred your claim to this land since making your sworn statement, or have you directly or indirectly made any agreement or contract in any way or manner, with any person whomsoever, by which the title which you may acquire from the Government of the United States may inure in whole or in part, to the benefit of any person except yourself.

Ans. No.

Ques. 14. Do you make this entry in good faith for the appropriation of the land exclusively to your own use and not for the use or benefit of any other person?

Ans. Yes.

Ques. 15. Has any other person than yourself, or has any firm, corporation or association any interest in this entry you are now making, or in the land, or in the timber thereon?

Ans. No.

JOHN S. WATKINDS.

I hereby certify that the above named John S. Watkinds personally appeared before me; that I verily believe affiant to be the person he represents himself to be; and that each question and answer in the foregoing testimony was read to him in my presence before he signed his name thereto, and that the same

was subscribed and sworn to before me at Prineville, Oregon, this 8th day of December, 1902.

M. R. BIGGS,

U. S. Commissioner for District of Oregon.

NOTE: Every person swearing falsely to the above deposition is guilty of perjury and will be punished as provided by law for such offense. In addition thereto the money that may be paid for the lands is forfeited, and all conveyances of the land or of any right, title or claim thereto was absolutely null and void as against the United States.

I hereby certify that I have tested the accuracy of affiant's information and the bona fides of this entry by a close and sufficient oral cross-examination of the claimant, and his witnesses, directed to ascertain whether the entry is made in good faith for the appropriation of the land to the entryman's own use and not for sale or speculation, and whether he has conveyed the land or his right thereto, or agreed to make any such conveyance, or whether he has directly or indirectly entered into any contract or agreement in any manner with any person or persons whomsoever by which the title that may be acquired by the entry shall inure in whole or in part to the benefit of any person or persons except himself, and am satisfied from such examination that the entry is made in good faith for entryman's own exclusive use and not for sale or speculation, nor in the interest nor for the benefit of any other person or persons, firm or corporation.

M. R. BIGGS,

U. S. Commissioner for District of Oregon.

TENTH. In admitting over the objection of the said defendant the cross-examination of said claimant, J. F. Watkinds, made in connection with said final proof, as follows

TIMBER AND STONE LANDS.

Cross-Examination of Claimant in Connection with Direct Examination on Form 4-370.

Before taking the testimony the Register and Receiver will read or cause to be read to the witness, Section 2392 of the Revised Statutes in regard to perjury—see bottom of page on Form 4-371—and see that witness understands same.

Question 1. Are you an actual bona fide citizen of this state?

Answer. Yes.

Question 2. Are you married or single?

Answer. Married.

Question 3. Where did you reside prior to becoming a resident of this state, and what was your occupation?

Answer. Born and raised in Oregon. Am a farmer.

Question 4. How long have you been an actual resident of this state, and where have you lived during all of this time?

Answer. 43 years. Linn and Crook counties.

Question 5. What has been your occupation during the past year, and where and by whom have you been employed and at what compensation?

Answer. Farming for myself.

Question 6. How did you first learn about this particular tract of land and that it would be a good investment to buy it?

Answer. In July, wanting to take timber, went up in the timber and located this land.

Question 7. Did you pay or agree to pay anything for this information. If so, to whom and the amount?

Answer. No.

Question 8. Have you made a personal examination of

each smallest subdivision of said land? If so, state when and under what circumstances and with whom.

Answer. Yes, in July, with my wife and daughter, Wilford J. C. Cain and George M. Gaylord.

Question 9. How did you identify said lands? Describe it fully.

Answer. By Government corners as N. E. 1-4 Sec. 24, Tp. 15 S., R. 19 E. W. M.

Question 10. How many thousand feet, board measure, of lumber did you estimate that there is on this entire tract, and what is the stumpage value of same?

Answer. One and a half million feet, at 50 cents per M.

Question 11. Are you a practical lumberman or woodman? If not, how did you arrive at your estimate of the quantity and value of the lumber on the land?

Answer. I have worked a great deal in the woods.

Question 12. What do you expect to do with this land and lumber on it when you get title to it?

Answer. I expect to use it the best I can.

Question 13. Do you know of any capitalist or company which is offering to purchase timber land in the vicinity of this entry? If so, who are they and how did you know of them?

Answer. No.

Question 14. Has any person offered to purchase this land after you acquire title? If so, who and for what amount?

Answer. No.

Question 15. Where is the nearest and best market for the timber on this land at the present time?

Answer. Prineville, Or.

Question 16. Did you pay out of your individual funds,

all expenses in connection with making this filing and do you expect to pay for the land with your own money?

Answer. Yes.

Question 17. Where did you get the money with which to pay for this land, and how long have you had same in your actual possession?

Answer. Made it out of my hay crop of this year; had it about two months.

Question. Have you kept a bank account during the past six months, and if so, where?

Answer. No.

In addition to the foregoing the officer before whom the proof is made will ask such questions as seem necessary to bring out all the facts in the case.

JOHN S. WATKINDS.

TWELFTH. In overruling the objection of the said defendant to the question asked of said witness Joel Calavan.

Q. What was your understanding at the time as to what the terms were upon which you were taking it up?

And in permitting the witness to answer the same.

A. Why, I understood that I was to receive $500 for the same when the patent issued.

THIRTEENTH. In overruling the objection of the said defendant to the question asked of said witness Calavan.

Q. And it was your intention at the time you were making that filing to convey it for the $500 as soon as you did get patent, or what was your intention in respect to it?

And in permitting the witness to answer the same.

A. My inention was to convey it to them when I got patent.

FOURTEENTH. In overruling the objection of the said de-

fendant to the question asked of said witness Calavan.

Q. To whom?

And in permitting the witness to answer the same.

A. To Gesner.

FIFTEENTH. In admitting the final proof papers of the said witness Calavan, together with the cross-examination of the claimant which said final proof and cross-examination were substantially the same as in the case of witness Watkinds hereinbefore set forth.

SEVENTEENTH. In overruling the objection of the said defendant to each of the following questions, and in permitting the answers thereto.

Q. That was your idea at the time, was it?

A. Yes, sir.

Q. Now, at the time that you filed, what was your intention as to what you would do with the land when you got title?

A. It was my intention to let Gesner have it.

Q. What was your understanding as to whether you had promised to do that or not.

Q. Well, what did you believe.

A. Well, I would have felt that way if I had went ahead and proved up on land and they had furnished me the money to do it with.

Q. That was your understanding of it?

A. Yes, sir.

NINETEENTH. In overruling the objection of the said defendant to the question asked of witness Jeff Evans.

Q. Now, at the time you signed that paper, what was your intention as to what you would do with the land when you secured a patent to it?

And in permitting the answer to the same.

A. Well, of course, I calculated to sell it; I supposed that Mr. Gesner would take the land.

And also in overruling the same objection to each of the following questions and in permitting answers thereto by the same witness.

Q. For what consideration?

A. Well, I supposed he would give me $500.00 for it.

Q. Was it your intention at the time you signed that to carry that out?

A. Well, I intended to take that for it if I could not get anything more out of it.

Q. If you could not get anything more out of it?

A. Yes.

Q. Did you tell him that?

A. No, I didn't.

Q. You were careful not to, were you?

A. Yes.

Q. Why were you careful not to?

A. Well, I thought at the time maybe that I could get more out of it.

Q. Why didn't you let him know that.

A. Well, I don't know exactly. I thought it was a little sum of money to get out of it, but still if I could not get any more I calculated to take it.

Q. Why didn't you tell him you calculated to try to get more from some one else if you could?

A. I didn't think there was any use.

Q. Wasn't it because you didn't think he would lend you the money?

A. No, I didn't think—well, yes, I guess that is—that

would be the main thing. I supposed that he wanted the land. I knew that he wanted the land.

TWENTIETH. In overruling the objection of the said defendant to the question asked of witness Henry Hudson.

Q. What was your intention as to what you would do with the land at the time you signed that?

And in permitting the witness to answer the same.

A. Well, I was going to sell it, of course, if I could. I took it up for speculation.

And also in overruling the same objection to each of the following questions and permitting the answers thereto.

Q. Sell it to whom?

A. Well, I was going to sell it to the highest bidder. I was calculating to make $1000.00 out of it if I could, and if I could not I would let it go to Dr. Gesner.

Q. What did you understand at that particular time as to whether you had agreed to sell it to Gesner or not?

A. Well, I don't know, it was a kind of an agreement, a verbal one, though.

TWENTY-FIRST. In overruling the objection of the said defendant to the question asked of Christian Feuerhelm.

Q. Now, at the time you filed this paper—signed it—what was your intention as to what you were going to do with the land when you got title to it?

And in permitting the witness to answer the same.

A. Well, I thought it should go to Gesner.

TWENTY-SECOND. Error in admitting in evidence over the objection of the said defendant the final proof papers of the said witness Christian Feuerhelm, which said final proof papers were of like tenor and effect as those hereinbefore set forth of John Watkinds.

TWENTY-THIRD. In overruling the objection of the said defendant to the question asked of said witness Feuerhelm.

Q. What was your understanding when you left Gesner and when you filed on a claim as to whether you had promised that you would let him have it when you got the title.

And in permitting the witness to answer the same.

A. Well, there was no real promising.

And also in overruling the objection of each of the following questions and in permitting the answers thereto.

Q. You didn't say that.

A. No, sir.

Q. But what was your understanding as to what he believed and what did you believe.

A. I believed nothing else but I went in to file on the claim.

Q. At the time you filed, did you intend to let Dr. Gesner have the land when you got the title—at the time you were signing that paper—filing?

A. I guess I thought so.

TWENTY-FOURTH. In overruling the objection of the said defendant to the question asked of witness Lettie Watkinds.

Q. What did he say.

And in permitting the answer to the same.

A. Well, he said that Mr. Biggs wanted us to go and take timber clairs or something like that.

And also in overruling the objection of said defendant to each of the following questions and in permitting the answers to the same by the same witness.

Q. Do you remember what else he said about it as to what the terms were, or anything of that sort, what you were to make out of it?

A. Well, my understanding was we would make about $75.00.

Q. And how were you to make it?

A. Well, from Gesner and Williamson was my understanding.

Q. Is that what your husband told you.

A. I think so.

Q. Did he say what you were to do with the land when you got the title? Did your husband tell you what you were to do with the land when you got the title?

A. Yes sir.

Q. What did he say?

A. To sell it to Gesner & Williamson.

THIRTY-SECOND. In overruling the objection of the said defendant to the admission of each and all of the seven certain photographs taken by one A. B. McAlpin of different points on the timber claims of M. R. Biggs, one of the said defendants.

THIRTY-SECOND (*a*) Error in admitting over the objection of the said defendant each and all of the six photographs taken by said A. B. McAlpin on the claim of defendant Williamson so as to show different portions of said claim.

THIRTY-FOURTH. Error in admitting over the objection of the said defendant photographs of the claims of several of the other applicants, such applicants being other than the defendants.

THIRTY-FIFTH. In overruling the objection of the said defendant to the question asked of witness David Edgar.

Q. After looking at the memoranda, can you tell us as to the general character of the NE 1-4 of 24-15, 18 E-

And in permitting the witness to answer the same.

A. Yes, sir, I can give you a general idea. It is an open

country with very little timber to speak of. It is a grass country.

THIRTY-SIXTH. In overruling the objection of the said defendant to the question asked of witness David Edgar.

Q. What is the character of the whole of township 15-19, as to timber?

And in permitting the witness to answer the same.

A. What I saw of it, it does not amount to anything for the timber, I should think. That is, what I saw of it.

THIRTY-SEVENTH. In overruling the objection of the said defendant to the question asked of the witness David Edgar.

Q. What was the character of the Biggs claim?

And in permitting the witness to answer the same.

A. Well, it is open country, with some timber, a few trees, scrubby, nothing of any account.

THIRTY-EIGHTH. In overruling the objection of the said defendant to the question asked of said witness David Edgar.

Q. For lumber, what would you call the grade of the timber up there, the best of it?

And in permitting the witness to answer the same.

A. I would call it very poor, coarse.

THIRTY-NINTH. In overruling the objection of the said defendant to the question asked of said witness Edgar.

Q. Make an estimate of the amount of timber on the J. N. Williamson claim.

And in permitting the witness to answer the same.

A. I estimate the timber at 320,000 feet.

FORTIETH. In overruling the objection of the said defendant to the admission of similar questions and similar answers concerning the amount of timber upon different claims taken by different applicants, and to the answer of the wit-

ness tending to show the amount of timber of each of said different claims.

FORTY-FIRST. In overruling the objection of the said defendant to the testimony of one John C. Murray and one William Mitchell and each of them, each of whom testified along the same lines as the said witness Edgar.

FORTY-SECOND. In overruling the objection of the said defendant to the question asked of said witness William Mitchell.

Q. What did you hear him say?

And in permitting the witness to answer the same.

A. Dr. Gesner came into the hotel and Mr. Cooper said: "Hello, Doc, how is things getting along up there?" Those fellows fellows don't seem to be wanting to tell all they know; they dassant tell all they know.

FORTY-THIRD. In overruling the objection of the said defendant to the admission of the final proof of and cross-examination of Laura Biggs, and final proof and cross-examination of Mrs. Williamson, Ora F. Parker, Sarah Parker, ——— Foster, Mrs. Foster, Josiah Hinkle, Chas. Graves and Maria Graves, and in admitting the final proof and in admitting the cross-examination of each of said persons and of the whole.

FORTY-FOURTH. In overruling the motion of the said defendant for the striking out of all of the testimony in relation to the final proofs.

FIFTY-SECOND. In overruling the objection of the said defendant to the question asked of said witness Williamson.

Q. Didn't you have an interest in some with Boggs? In the neighborhood of the reserve, the lines of the reserve, which were withdrawn on July 28th, 1902. Didn't you have an interest in some school sections with Boggs and Gesner.

And in permitting and directing the witness to answer the same.

A. Not in that section of the country.

FIFTY-THIRD. In overruling the objection of the said fendant to the question asked of said witness Williamson.

Q. Did you have any in Crook county in connection with Boggs and Gesner?

And in permitting and directing the witness to answer the same.

A. I am not certain; there might have been a section or two. There might have been some. I have forgotten where that land is, but I think there was some next the line.

FIFTY-FOURTH. In overruling the objection of the said defendant to the question asked of said witness Williamson.

Q. Boggs secured the application for those in Prineville, for you in July 1902, didn't he?

And in permitting and directing the witness to answer the same.

A. No one ever secured any application for me.

SIXTY-FIRST. In overruling the objection of the said defendant to the question asked of witness Campbell Duncan.

Q. Mr. Duncan, when you first saw Clarence Branton—the witness hereinbefore referred to, there (at the Adams ranch) what did he tell you, if anything, as to where he was going?

And in permitting and directing the witness to answer the same.

A. He said he was going to Idaho, on his road there.

SIXTY-SECOND. In overruling the objection of the said defendant to the question asked of said witness Campbell Duncan.

Q. And in that talk did Branton tell you that the reason he did not take up a claim was because there wasn't enough in it?

And in permitting the witness to answer the same.

A. Yes, sir.

SIXTY-THIRD. In overruling the objection of the said defendant to the question asked of witness William Adams.

Q. Well, did he state to you that he was going to Idaho at that time?

And in permitting the witness to answer the same.

A. Yes, sir.

SIXTY-FOURTH. In overruling the objection of the defendant to the question asked of the said witness William Adams.

Q. I am talking about the time he was camped there. Did he then state to you that he was going to Idaho?

And in permitting the witness to answer the same.

Yes, sir.

SIXTY-FIFTH. In overruling the objection of the said defendant to the question asked of witness Frank Ray.

Q. And on that occasion, did he say to you that the reason he did not take a timber claim at that time that he was up there at the shearing plant was because there wasn't enough in it, or words to that effect.

And in permitting the witness to answer the same.

A. Yes, he did.

SIXTY-SIXTH. In overruling the objection of the said defendant to the question asked of witness Van Gesner.

Q. Doctor, I will ask you to examine that certified copy

of those letters, and you can examine the certificate also. The letter referred to was as follows

PRINEVILLE, Or., June 23, 1902.

M. L. Chamberlain,

Salem, Or.

My Dear Sir:

Inclosed find check for $80 for payment on the West half of Section 16, T. 15 S. R. 19 E., containing 320 acres. My sister, Mrs. S. M. Gerowe, will forward the application as soon as she can sign it. Who has the S. E. 1-4 of that section. Is it paid up on or it it subject to a new filing. Please let me know at your earliest convenience.

I remain

Yours respect.

VAN GESNER.

And in permitting the witness to answer the same.

A. I guess I wrote that letter.

SIXTY-SEVENTH. In overruling the objection of the defendant to the question asked of witness Van Gesner.

Q. You think you wrote that letter?

And in permitting the witness to answer the same.

A. Yes.

SIXTY-EIGHTH. In overruling the objection of the defendant to the question asked of witness Van Gesner.

Q. And received the reply that is attached there?

And in permitting the witness to answer the same.

A. I don't remember the reply! I don't remember anything about that.

SIXTY-NINTH. In overruling the objection of the said defendant to the question asked of witness Van Gesner.

Q. But you remember writing the letter?

And in permitting the witness to answer the same.

A. I remember writing some letter there.

SEVENTIETH. In overruling the objection of the defendant to admitting in evidence a certified copy of the application of Sarah M. Gerowe to purchase the W 1-2 of Section 15, Tp. 15, S. R. 19 E., dated 26th day of June, A. D. 1902, together with the affidavit attached.

SEVENTY-FIRST. In overruling the objection of the said defendant to the admission of a certified copy of a deed from the State Land Board to Williamson, Wakefield & Gesner for the same, bearing date of 21st day of August, 1902.

SEVENTY-SECOND. In overruling the objection of said defendant to the admission of a certified copy of the letter hereinbefore specified.

SEVENTY-SECOND...(*a*) In compelling the defendant Van Gesner to be recalled for further cross-examination after the close of defendant's case and after the opening of the Government's case in rebuttal, and in compelling him to answer the following questions.

SEVENTY-THIRD. In overruling the objection of the said defendant to the question asked of witness Van Gesner.

Q. Doctor, in Prineville, between the 15th day of June, 1902, and the 25th day of June, 1902, did you have a conversation with Lawrence T. Perry, in that conversation, did you ask him to sign a school land application and an assignment of the same to the firm of Williamson & Gesner, or Williamson, Wakefield & Gesner, and state to him that the land was up in Horse Heaven country; and did he ask you how much there would be in it for him, and did you answer $50; and did he then say, if he took up any school land, he would keep the land for his own use, and walked off, and did you say, as he was walking off, that

it would be no trouble, "All you would have to do would be to go to the office and sign a paper," or words to that effect?

And in permitting and directing the witness to answer the same?

A. I will say I never had any such conversation with Mr. Perry as that, none whatever at any time, June, July or any time.

SEVENTY-FOURTH. In overruling the objection of the defendant to the question asked of witness Van Gesner.

Q. On or about June 24, 1902, in Prineville, did you ask Mary W. Swearingen to file upon 320 acres of school land in section 16, township 15-19, in the Horse Heaven country and tell her that you would give her $50, if she would make the application and an assignment to Williamson & Gesner, or Williamson, Wakefield & Gesner, or words to that effect? Or did you tell her you would give her $25 for filing upon 160 acres, at the same time and place?

And in permitting and directing the witness to answer the same.

A. Why, I think she filed on a piece of land up there, but there was no contract to sell it to me. She was keeping boarders there, and there was a vacant piece, and I told her she could make something out of that land by filing on it, and if she wanted to file on it, I would let her have the money, and I did let her have the money, I think, and she filed on the land, and I bought the land of her. But I had no contract with her before to buy, no specified sum or anything else.

SEVENTY-FIFTH. In overruling the objection of the said defendant to the question asked of witness L. T. Perry.

Q. Mr. Perry, in Prineville, between the 15th and 26th of June, 1902, did Dr. Gesner ask you to sign a school land applica-

tion and an assignment to the firm of Williamson, Wakefield & Gesner, or Williamson & Gesner, and did you ask him where the land was, and did he tell you it was up in the Horse Heaven country; and then did you ask him what there would be in it for you, and did he answer $50? And did you then tell him if you took up any school land, you would keep the land for your own use, and did you start to walk off, and did he then say, it would be no trouble, "All you would have to do would be to go to the office and sign a paper."

And in permitting the witness to answer the same.

A. I had a conversation with Dr. Gesner, but I am lost as to the date; I would not say as to the date you speak of.

SEVENTY-SIXTH. In overruling the objection of the said defendant to the question asked of witness L. T. Perry.

Q. Now answer the question.

And in permitting the witness to answer the same.

A. The conversation that occurred between Dr. Gesner and myself occurred in front of Temple's drug store. He asked me this question, if I didn't want to take up a piece of school land—that conversation in substance and effect took place.

SEVENTY-SEVENTH. In overruling the objection of the said defendant to the question asked of witness Mary A. Swearingen.

Q. Will you state to the jury the circumstances under which you signed that paper, how you came to do it?

And in permitting the witness to answer the same.

A. Well, there isn't much to it. The Doctor just came down and asked me if I would file on a piece of school land; so I told him I would.

Juror. I can't understand you.

A. I say that he came and asked me if I would file on a piece of school land. I told him that I would. I went there and filed on the land. He was to give me $25 for filing on the 160 acres, as well as I remember; I don't remember just the amount. So I went before the county clerk, Mr. Smith, and filed on the school land.

SEVENTY-EIGHTH. In overruling the objection of the said defendant to the question asked of witness Mary Swearingen.

Q. Now, what did you say when he said that he wanted you to file on it, just what did he say. Tell the whole thing.

And in permitting the witness to answer the same.

A. Well, I don't remember just how it was.

SEVENTY-NINTH. In overruling the objection of the said defendant to the question asked of the witness Mary Swearingen.

Q. No; but the subsance of it as you can recollect it.

And in permitting the plaintiff to answer the same.

A. Well, just as well as I remember, he came down and he said that he would give my daughter and I $50 to file on a quarter section or a half section—something—I don't remember the amount; but, anyway, when the time came and we went to the clerk's office, part of it had been taken or he didn't want part of it—something like that, or they didn't say it was for him at all. Just asked us to file on it. And so my daughter didn't file, I filed on it and he gave me $25.

EIGHTIETH. In overruling the objection of the said defendant to the question asked of Mary Swearingen.

Q. Now, when you went up to file, what did you do when you got before the clerk; how did you come to go there?

And in permitting the witness to answer the same.

A. Well, I don't remember why or how I came to go there.

EIGHTY-FIRST. In overruling the objection of the said defendant to each of the following questions asked of the witness Mary Swearingen, and in permitting the witness to answer the same.

Q. When you went there did you have a description of the land?

A. No, sir.

Q. And when you got there did you tell the clerk what land you wanted?

A. The description was there.

Q. He had it, did he?

A. The clerk had it, yes, sir.

EIGHTY-SECOND. In overruling the objection of the said defendant to the admission of the application of the said Mary Swearingen in evidence.

EIGHTY-NINTH. In overruling the objection of the said defendant to the question asked of witness James Keenan.

Q. What sort of country is that for sheep pasture in 15-19?

And in permitting the witness to answer the same.

A. Well, I believe it is about the best I ever saw anywhere.

NINETIETH. In overruling the objection of the said defendant to the question asked of witness Gaylord.

Q. Was there a road running to it?

And in permitting the witness to answer the same.

A. Just a kind of a by-road where they had been using going in and out with their sheep supplies.

NINETY-FIRST. In overruling the objection of the said defendant to each of the following questions asked of witness Gaylord, and in permitting the witness to answer the same.

Q. Could you drive in there anywhere with a wagon without a road?

A. Yes, sir, most of the way.

NINETY-SECOND. In overruling the objection of the said defendant to the question asked of witness Thomas M. O'Connell.

Q. Now, then, how does the timber in 15-19 compare with the timber in 15-20, in a general way?

And in permitting the witness to answer the same.

A. Well, 15-20 is better timber.

NINETY-THIRD. In overruling the objection of the said defendant to each of the following questions asked of said witness O'Connell and in permitting the witness to answer each and all of the same.

Q. How does the timber in 15-19 compare with the timber in 14-19?

A. Well, what I done in 14-19 I think that is better.

Q. Did you locate anybody in 15-19?

A. No, sir.

Q. Did you attempt to?

A. No, sir.

Q. How does that 15-19 compare with the other townships that you mention that you have cruised there?

A. Well, I didn't do very much work in that town. I had been in across the town.

Q. What is the character of the timber in a general way as you found it in going across the town?

A. Well, it was short and very scattering, of a coarse nature.

NINETY-FOURTH. In overruling the objection of the said defendant to the question asked of witness James Keenan.

Q. What sort of a country is that for sheep pasture in 15-19?

And in permitting the witness to answer the same.

A. Well, I believe it is about the best I ever saw.

NINETY-FIFTH. In overruling the objection of the said defendant to the admission in evidence of a deed identified by G. G. Brown witness as a deed issued by the State Land Board to Mary A. Swearingen, of date June 24th, 1902, to the land applied for by her, which deed is as follows:

"STATE OF OREGON."

"In consideration of Two Hundred Dollars paid to the State Land Board, the State of Oregon does hereby grant, bargain, sell and convey unto Mary A. Swearingen, the following described land, to-wit: Situated in Crook County, Oregon; the Northeast Quarter of Section 16, Township 15 South, Range 19 East of the Willamette Meridian, containing 160 acres."

"To have and to hold the same unto said Mary A. Swearingen, her heirs and assigns forever."

"Witness the seal of the State Land Board, affixed this 26th day of June, 1902.

(Signed.) "T. T. GEER, Governor,
"I. F. DUNBAR, Secretary,
"CHARLES S. MOORE, Treasurer."

NINETY-SIX. In overruling the objection of the said defendant to the admission in evidence of a deed issued by the State Land Board of the State of Oregon to J. M. Williamson, E. N. Wakefield and V. Gesner, of which the following is a copy:

"STATE OF OREGON."

"In consideration of Four Hundred and 00-100 Dollars paid to the State Land Board, the State of Oregon does hereby grant, bargain, sell and convey unto J. M. Williamson, E. N. Wakefield and V. Gesner, the following described lands, to-wit: Situated in Crook County, Oregon; the West half of Section 16, Township 15 South, Range 19 East, of Willamette Meridian, containing 320 acres.

"To have and to hold the same unto said J. M. Williamson, E. N. Wakefield and V. Gesner, their heirs and assigns forever.

"Witness the seal of the State Land Board, affixed this 12th day of August, 1902.

(L. S.) "T. T. GEER, Governor,
"F. I. DUNBAR, Secretary,
"CHARLES S. MOORE, Treasurer."

NINETY-SEVENTH. The Court erred in instructing the jury in said cause as follows: "The offense is sufficiently proved if the jury is satisfied from the evidence, beyond a reasonable doubt, that two or more of the parties charged, in any manner or through any contrivance positively or tacitly came to a mutual understanding to accomplish a common and unlawful design, followed by some act done by any one of the parties for the purpose of carrying it into execution."

NINETY-EIGHTH. The Court erred in instructing the jury in said cause as follows: "Every person who procures another to commit any perjury is guilty of subornation of perjury, and is punishable by fine or imprisonment."

NINETY-NINTH. The Court erred in instructing the jury in said cause as follows: "So much of section 3 as is material reads as follows: "That upon the filing of said statement, as

provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act; unoccupied and without improvements other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper or coal that upon payment to the proper officer of the purchase money of said land, together wtih the fees of the register and the receiver, as provided for in the case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon."

Effect is to be given to the provisions of the law by regulations to be prescribed by the Commissioner of the General Land Office at Washington.

The first step, therefore, on the part of any person desiring to avail himself of the benefits of the law is the filing of a written statement which must be sworn to before the register or receiver, or which may be sworn to before a United States Com-

missioner, designating the particular tract which the applicant *desires to purchase* setting forth that the land is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements except for ditch purposes, nor, as deponent verily believes, any valuable deposits of gold, silver cinnibar, copper or coal; that deponent has made no other *application* under this act; that he does not *apply to purchase* the same on speculation, but in good faith to appropriate the land to his own exclusive use and benefit; and that he has not directly or indirectly made any agreement or contract in any way or manner with any person or persons whomsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself. If a person taking the oath to such statement swears falsely in the premises the law subjects him to all the pains and penalties of perjury.

ONE HUNDREDTH. The Court erred in instructing the jury in said cause as follows:

Now, when the sworn statement is filed, the register posts a notice of the application, embracing a description of the land, in his office for a period of sixty days, and furnishes the applicant a copy of the same for publication in a newspaper published nearest the location of the premises, for a like period of time. And it is provided by law, and by regulation duly made by proper authority and having the force and effect of law, that, after the expiration of said sixty days, the person or claimant desiring to purchase shall furnish to the register of the land office satisfactory evidence, among other things, that notice of the application prepared by the register was duly published in a newspaper as required by the law; that the land is of the character contemplated in the act; that the applicant has not sold or

transferred his claim to the land since making his sworn statement, and has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whomsoever, by which the title he may acquire from the Government, may inure, in whole or in part, to the benefit of any person except himself; and that he makes his entry in good faith for the appropriation of the land exclusively for his own use and not for the use and benefit of any other person.

One Hundred and First. The Court erred in instructing the jury in said cause as follows: But, as heretofore said, if he is not in good faith and has directly or indirectly made any agreement or contract in any way or manner with any persons by which the title he may acquire from the United States shall inure in whole or in part to the benefit of any persons except himself, then he commits perjury, in making his sworn statement, and in making a deposition that he has not done those things; and any person who knowingly and wilfully procured and instigates the person to make such sworn statement or deposition is guilty of subornation of perjury.

Having now placed before you the timber and stone law and what it denounces, and what it permits, if a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do in the matter of loaning money to upplicants under it, and fully and honestly lays all the facts before his counsel, and in good faith and honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he could not be convicted of crime which involves willful and unlawful intent, even if such advice were an inaccurate construction of the law. But, on the other hand, no man can wilfully and knowingly violate the law and excuse him-

self from the consequences thereof by pleading that he followed the advice of counsel. And especially in using the words therein "And in making a deposition that he has not done those things."

One Hundred and Second. The Court erred in instructing the jury in said cause as follows: The essential questions then for your determination are, does the evidence show, beyond a reasonable doubt, that Williamson, Gesner and Biggs, or two of them, knowingly and intentionally, entered into an agreement or combination to induce or procure persons to apply to purchase and enter the lands as alleged, or some part of the lands charged in the indictment as lands subject to entry under the timber and stone act, after having first come to an agreement or understanding with such persons that they would convey the title which they might acquire to Williamson & Gesner, or either of them; and next, does the evidence satisfy you beyond a reasonable doubt, that these defendants, so combining and agreeing, intended that the persons or some of the persons, whom they might procure or induce to make such entries should willfully and deliberately, in making their sworn statements or applications to purchase such lands at the time of making the first paper called a sworn statement, or at the time of making their depositions or sworn statements when they made their final proofs before the United States Commissioner, applying to purchase such lands, commit perjury by swearing falsely that their applications were not made on speculation, but in good faith to appropriate the lands to the exclusive use and benefit of the applicant or applicants, and that the applicant or applicants had not, directly or indirectly, made any agreement or contract in any way or manner, by which the title to be acquired from the United States should inure in whole or in part to the benefit of any persons other than

himself or herself. And especially in using the words in said foregoing instruction, "or some of the persons," and also in using the words therein "or at the time of making their depositions or sworn statements when they made their final proofs before the United States Commissioner."

One Hundred and Sixth. The Court erred in refusing to give the following instruction to the jury at the request of the defendant:

In order to constitute perjury there must be a willful and corrupt making of a false statement, and however false or untrue a statement may be, there can be no perjury if the person making the statement believes it to be true at the time of making it.

One Hundred and Seventh. The Court erred in refusing to give the following instruction to the jury requested by said defendant:

The suborning of perjury necessarily includes every element of actual perjury and in order to constitute that crime it is necessary that one person shall purposely and intentionally procure or induce another to commit perjury, that is, to willfully and corruptly and intentionally swear to something, which the party taking the oath does not believe to be true.

One Hundred and Eighth. In refusing to give the following instruction to the jury requested by said defendant:

If the defendants believed that the persons who were to make the statements in question could do so truthfully and without stating a falsehood, they would not be guilty of the crime charged, however much they may have been mistaken as to the law or the facts.

One Hundred and Ninth. In refusing to give the following instruction to the jury requested by said defendant:

If the defendants believed that the arrangement with the applicants for the land in question was within the law and that such applicants could truthfully make the statements in question, then they are not guilty of the crime charged, even if they were mistaken and the arrangement between them and the applicants were really in violation of law.

One Hundred and Tenth. In refusing to give the following instruction to the jury requested by said defendant:

Even if you should find that some one of the defendants intended to suborn perjury, or even actually did so, that would not justify a conviction, of the charge in this indictment unless you further find that two or more of these defendants, definitely planned and agreed among themselves to procure the alleged perjury.

One Hundred and Eleventh. In refusing to give the following instruction to the jury requested by said defendant:

Even if you find that perjury was committed by some one or more of the applicants in question, that would not justify a verdict of guilty unless you further find that at least two of the defendants conspired and agreed together to procure the perjury to be committed.

One Hundred and Twelfth...In refusing to give the following instruction to the jury requested by said defendant:

The defendants are not charged with defrauding or attempting to defraud the government, and therefore any mere attempt to evade the law upon their part (if there was any such attempt) would not justify a verdict of guilty unless there was actually a conspiracy or agreement between them to procure perjury.

One Hundred and Thirteenth. In refusing to give the following instruction to the jury requested by said defendant:

If you have a reasonable doubt as to whether there was an agreement between the defendants to procure perjury to be committed, you should give them the benefit of the doubt.

One Hundred and Fourteenth. In refusing to give the following instruction to the jury requested by said defendant:

Letters and declarations of certain of the defendants have been admitted in evidence, but before you can consider them as against any other defendant you must be satisfied beyond a reasonable doubt by other evidence independent of such statements that three was a conspiracy between the defendant making the statement and such other defendant to commit the crime.

One Hundred and Fifteen. In refusing to give the following instruction to the jury requested by said defendant:

An applicant for timber land has a right to file on it with the intention of selling it at a profit after he has acquired title; and such filing would be for his own use and benefit, within the meaning of the law.

One Hundred and Sixteenth. In refusing to give the following instruction to the jury requested by said defendant:

So the mere intention to sell at a profit at some future time would not be "on speculation" within the meaning of the law.

One Hundred and Seventeenth. In refusing to give the following instruction to the jury requested by said defendant:

Even if the applicant expected to sell the land to some particular person whom he knew to be buying timber land in that locality, it would be no violation of the law unless there was an actual contract to make the sale.

One Hundred and Eighteenth. In refusing to give the following instruction to the jury requested by said defendant:

An applicant for timber land has a right to borrow money

to prove up on his land, and if necessary to mortgage the land to secure payment, and this would be no violation of the law.

One Hundred and Nineteenth. In refusing to give the following instruction to the jury requested by said defendant:

He may also loan money to applicants to enable them to prove up, with the intention of buying if possible, after title is secured, and if there is no actual contract, for the sale of the land, his action in so doing would be lawful.

One Hundred and Twenty-first. In refusing to give the following instruction to the jury requested by said defendant:

The charge in the indictment is that there was an agreement between the defendants, general in its character, to suborn *a large number of persons* to commit perjury. An agreement to suborn one or two persons only would not sustain the indictment even if it were proven.

One Hundred and Twenty-second. In refusing to give the following instruction to the jury requested by said defendant:

The fact that a Grand Jury has found an indictment in this case should not be permitted to influence you in the least. The Grand Jury may hear only one side of the case, and the defendants had no opportunity to appear before that body and cross-examine the witnesses, and as I have said, its decision should not affect your judgment.

One Hundred and Twenty-third. In refusing to give the following instruction to the jury requested by said defendant:

If you find from the evidence that Gesner expressly refused to make a contract and did not intend to many any contract or agreement with the applicants for the purchase of the lands; the mere fact that he expected or intended to purchase it

at some future time, and that the applicants or some of them intended to sell to him if they could not do better (if you find these to be the facts) would not make an agreement which would be in violation of the law.

One Hundred and Twenty-fourth. In refusing to give the following instruction to the jury requested by said defendant:

The charge in this indictment is that the oaths of the applicants in question were intended to be false in the matter of the alleged contract to convey to Gesner and Williamson and you must base your findings upon that charge alone.

One Hundred and Twenty-fifth. In refusing to give the following instruction to the jury requested by said defendant:

There is no charge in the indictment, that the alleged oath that the applicants were to take, were false as to the character of the land or as to the manner of obtaining the money with which to pay for it.

One Hundred and Twenty-sixth. In refusing to give the following instruction to the jury requested by said defendant:

Even if you should believe therefore that the applicant or some of them were inaccurate or testified falsely as to where or how they obtained the money to prove up on their claims, that alone would not be sufficient to sustain a verdict of guilty in this cause.

One Hundred and Twenty-seventh. In refusing to give the following instruction to the jury requested by said defendant:

So there is no charge in the indictment of any intended falsity in the oaths of the applicants as to the amount or quality of timber on the different claims, and even if you should believe

from the evidence that there was some inaccuracy or falsity in that regard, in the oaths or proofs of some of the applicants, that would not be sufficinet to sustain a conviction.

One Hundred and Twenty-eighth. In refusing to give the following instruction to the jury requested by said defendant:

Indeed, it is alleged in the indictment that the lands in questions were "subject to filing under the timber and stone act" and this necessarily implies that they were chiefly valuable for timber and stone and you must assume for the purpose of this case that this is true. The indictment being based upon this theory the government is now estopped from claiming otherwise.

One Hundred and Twenty-ninth. In refusing to give the following instruction to the jury requested by said defendant:

The defendants are not charged with perjury in the matter of their own applications or final proofs, and they are not on trial therefore as to such application and proofs. You cannot therefore find them either guilty or not guilty as to the matter of the statements made in the matter of their own claims.

One Hundred and Thirtieth. In refusing to give the following instruction to the jury requested by said defendant:

In such case the mere fact that one of the lawyers to whom he applied for advice, was included with him in this indictment would make no difference as to his rights in the matter.

One Hundred and Thirty-first. In refusing to give the following instruction to the jury requested by said defendant:

In this case the indictment charges conspiracy to suborn perjury in the matter of the sworn statement or application and not in the matter of the final proof.

One Hundred and Thirty-second. In refusing to give

the following instruction to the jury requested by the defendant:

Experience in the administration of justice makes it proper for courts to advise juries that the testimony of an accomplice should be received with great caution, and should be carefully scrutinized. This is because of the position which he takes, as confessing contamination with guilt, and admitting participation in the very crime which he endeavors by his testimony to fix upon the person on trial.

One Hundred and Sixty-third. In refusing to give the following instruction to the jury requested by the defendant:

There has been evidence admitted tending to show the purchase of certain school lands by some of the defendants. Whether or not there was anything irregular or illegal in such purchases, the defendants are not now on trial therefor, and you cannot find them either guilty or innocent thereon.

One Hundred and Thirty-fourth. That the Court erred in overruling the motion of said defendant for a new trial and in not allowing the same.

One Hundred and Thirty-fifth. That the Court erred in overruling and denying the said defendant's motion in arrest of judgment upon the ground that the indictment does not state a crime and that it does not sufficiently or at all allege that this defendant or any of the said defendants at the time of the alleged conspiracy or at all, knew that the matter to be sworn to by the persons alleged to be suborned, would be false, or that the defendants or either of them, then knew that the persons to be suborned or any of them, would know their statements to be false at the time they were made, or that the defendants knew or believed, that the persons to be suborned or any of them would

knowingly or wilfully or corruptly, take a false oath in reference to the matters alleged in the indictment or at all.

One Hundred and Thirty-sixth. That the Court erred in overruling said motion for arrest of judgment and in not allowing the same, upon the ground that said indictment is so uncertain that it does not state a crime.

One Hundred and Thirty-seventh. That the Court erred in entering judgment against said defendant on said indictment, because the same was not sufficiently certain and definite and did not charge a crime.

One Hundred and Thirty-eighth. That said Court erred in sentencing said defendant to pay a fine and to imprisonment without his first being adjudged guilty of the crime charged in the indictment or of any crime.

One Hundred and Thirty-ninth. That said Court erred in pronouncing sentence against said defendant.

THE COURT ERRED IN OVERRULING THE DEMURRER TO THE INDICTMENT AND IN OVERRULING AND DENYING MOTION IN ARREST OF JUDGMENT

Section 5440 of the Revised Statutes under which this proceeding is brought, provides that if two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do an act to effect the object of the conspiracy, all of the parties to such conspiracy shall be liable to a penalty, etc. The indictment in this case attempts to charge a conspiracy to commit an offense against the United States, namely, the offense of subornation of perjury, it being alleged that the perjury to be suborned was to take place before an United States Commissioner when a large number of persons should appear before him who would be applying to enter and purchase lands open to entry under the acts of Congress approved June 3rd, 1878, and August 4th, 1892, and known as timber and stone lands. It is also alleged that such applicants would take an oath to the effect that they were applying to enter and purchase such lands in good faith and for their own exclusive use and benefit, and that they had not directly or indirectly made any contract, in any way or manner, with any other person or persons. The falsity of the oath was to consist, according to the allegations of the indictment in this, that such persons had made a contract whereby the title to the land they might acquire would inure to the benefit of other persons, namely, the two plaintiffs in error, Williamson and Gesner.

An indictment under this section charging a conspiracy to commit an offense against the United States must charge a conspiracy to commit a statutory offense, as there are no common law offenses against the United States, and the conspiracy must

be sufficiently charged; and it cannot be aided by the averment of acts done by any one or more of the conspirators in furtherance of the object of the conspiracy.

The indictment must state all the material facts and circumstances embraced in the definition of the offense, and if any essential element of the crime is omitted, such omission can not be supplied by intendment or implication. The language of the Statute may be used in the general description of an offense, but it must be accompanied by such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, of which he is charged.

Such particulars are matters of substance and not of form, and their omision is not aided or cured by verdict.

An indictment under Section 5431 of the Revised Statutes alleging in the words of the Statute that the defendant feloniously, and with intent to defraud, did pass, utter and publish a falsely made, forged, counterfeited and altered obligation of the United States, but not further alleging that the defendant knew it to be false, counterfeited and altered, is insufficient even after verdict.

When the criminality of a conspiracy consists in an unlawful agreement to compass a criminal purpose that purpose must be fully and clearly stated in the indictment.

In support of the above propositions, see

Britton vs. United States, 108 U. S. 199; 27 L., Ed 698.
Pettibone et al vs. United States, 148 U. S. 197; 37 L. Ed. 419.
United States vs. Hess, 124 U. S. 486; 31 L. Ed. 516.
United States vs. Carl, 105 U. S. 611 (26:1135).
United States vs. Cruikshank 92 U. S. 542; (23:588).
United States vs. Simmons, 96 U. S. 360 (24:819).

The first two of the cases above cited were prosecuted under Section 5440, and in all cases prosecuted under the laws of the United States the accused has the constitutional right to be informed of the nature and cause of the accusation against him, which is construed to mean that the indictment must set forth the offense with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged; that every ingredient of which the offense is composed must be accurately stated, and that the acts and intent, going to make up the particular offense sought to be charged, must be set forth in the indictment with reasonable particularity as to time, place and circumstances.

To constitute a good indictment for subornation of perjury the false swearing must be set out with the same detail as on an indictment for perjury, and the indictment must charge that the defendants procured the witness to testify, knowing that the testimony would be false and knowing that the witness knew that the testimony he was about to give was false, and knowing that he would corruptly and wilfully give false testimony. In support of this proposition, see

U. S. vs. Dunnee, 3 Woods 39; 35 Fed. Cases 817.
U. S. vs. Wilcox, 4 Blatch, 393; 28 Fed. Cases 600.
U. S. vs. Evans, 19 Fed. Rep. 912.

It follows that an indictment charging defendants with a conspiracy so suborn perjury must state that the conspiracy charged in the indictment contemplated the doing of each and a'l

of the elements that go to make up the offense of subornation of perjury, and among other things it would be necessary, under the rules above stated, that the indictment should allege that the conspirators intended as a part of their conspiracy that the persons to be suborned should knowingly, wilfully and corruptly give false testimony. That the defendants as a part of the alleged conspiracy knew that they would in the future know that the matters to be sworn to by the persons to be suborned would be false, and that the unlawful agreement, constituting the conspiracy, contemplated that false matters should be sworn to and matters known to the conspirators to be false.

We quote all that portion of the indictment which is necessary for a full understanding of the point under discussion:

"That John Newton Williamson, Van Gesner and Marion R. Biggs, late of the City of Prineville, in the district aforesaid, on the thirtieth day of June, in the year of our Lord nineteen hundred and two, at Prineville aforesaid, in the said district, unlawfully did conspire, combine, confederate and agree together, and with divers other persons to the said grand jurors unknown, to commit an offense against the said United States, that is to say, to unlawfully, wilfully and corruptly suborn, instigate and procure a large number of persons, to-wit, one hundred persons, to commit the offense of perjury in the said district by taking their oaths there respectively before a competent officer and person in cases in which a law of the said United States authorized an oath to be administered, that they would declare and depose truly that certain declarations and depositions by them to be subscribed were true, and by thereupon, contrary to such oaths, stating and subscribing material matters contained in such declarations and depositions which they should not believe to be

true; that is to say, to suborn, instigate and procure the said persons respectively to come in person before him, the said Marion R. Biggs, who was then and there a United States Commissioner for the said District of Oregon, and, after being duly sworn by and before him, the said Marion R. Biggs, as such United States Commissioner, to state and subscribe under their oaths that certain public lands of the said United States, lying in Crook County, in said District of Oregon, open to entry and purchase under the acts of Congress approved June 3, 1878, and August 4, 1892, and known as timber and stone lands, which those persons would then be applying to enter and purchase in the manner provided by law, were not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the own exclusive use and benefit of those persons respectively, and that they had not directly or indirectly made any agreement or contract in any way or manner, with any other person or persons whomsoever, by which the titles which they might acquire from the said United States in and to such lands should inure in whole or in part to the benefit of any person except themselves, when in truth and in fact, as each of the said persons would then well know, and as they, the said John Newton Williamson, Van Gesner and Marion R. Biggs, would then well know, such persons would be applying to purchase such lands on speculation, and not in good faith to appropriate such lands to their own exclusive use and benefit respectively, and would have made agreements and contracts with them, the said John Newton Williamson, Van Gesner and Marion R. Biggs, by which the titles which they might acquire from the said United States in such lands would inure to the benefit of the said John Newton Williamson and Van Gesner, as co-partners in the firm of Williamson & Gesner, then and before then engaged

in the business of sheep raising in said county; the matters so to be stated, subscribed and sworn by the said persons being material matters under the circumstances and matters which the said persons to be suborned, instigated and procured, and the said John Newton Williamson, Van Gesner and Marion R. Biggs, would not believe to be true; and the said Marion R. Biggs, United States Commissioner as aforesaid, when administering such oaths to those persons, being an officer and person authorized by law of the said United States to administer the same oaths, and the said oaths being oaths administered in cases where a law of the said United States would then authorize an oath to be administered."

Is it alleged in the foregoing indictment that the defendants, or any of them, knew that the matters and things concerning which it is alleged the false oaths were to be taken were untrue when the conspiracy was formed?

Is it alleged, in any manner, that such knowledge was a part of such conspiracy, and that the plan or agreement, constituting the conspiracy, contemplated that the defendants, or any of them, should have the knowledge that the matters to be sworn, by the persons to be suborned, would be false?

A careful reading of the indictment will compel a negative answer to each of the foregoing questions.

There are two references in the indictment concerning the knowledge of the defendants as to the falsity of the matters to be sworn to by the persons who were to be suborned. In the first reference, it is alleged: "When in truth and in fact as each of the said persons would then well know and as they, the said John Newton Williamson, Van Gesner and Marion R. Biggs

would then well know such persons would be applying to purchase such lands on speculation."

The time when the defendants would have such knowledge is plainly alleged to be the same time as when the persons to be suborned would be applying to enter and purchase in the manner provided by law, and consequently at a time after the formation of the conspiracy and at or after the first overt act alleged in the indictment.

It is also perfectly obvious that it is not alleged that this knowledge was contemplated by the conspiracy or formed a part of it.

The allegation of their knowledge is interjected into the indictment not as showing what the conspiracy was or what it contemplated, but to show the state of mind of the defendants at some indefinite time in the future.

On the following page of the indictment we find the second reference to the defendants' knowledge of the alleged falsity of the matter to be sworn to. This reference is as follows: "And matters which the said persons so to be suborned, instigated and procured, and the said John Newton Williamson, Van Gesner and Marion R. Biggs would not believe to be true."

According to this allegation the defendants would have a knowledge of the falsity of statements to be sworn to at some indefinite future time, at what future time no person can say from the indictment; only this can be said with certainty that at some indefinite future time the defendants and the persons to be suborned would have knowledge that the matters to be sworn to were false.

The indictment does not allege that there was in the plan forming the conspiracy an agreement that the matter to be sworn to would be false.

Here again there is interjected into the indictment a statement concerning the future knowledge of the defendants.

All that has been said regarding the knowledge of the defendants touching the falsity of the matter to be sworn can be applied to the persons to be suborned.

On the first page of the indictment there is an allegation referring only to the persons to be suborned as follows: "Which they should not believe to be true." If the word "ought" had been used instead of the word "should" no different meaning would have been conveyed to the ordinary mind. As an allegation of knowldge it is worthless.

If an agreement of the kind referred to in the indictment were actually made between the defendants, the ultimate object of it was the acquiring of title to some portion of the public domain. The method of so acquiring title would be mere incidents in the plan, and it would be extremely improbable that the minds of the defendants should meet with definiteness enough, concerning these incidents, so that they would contemplate as a part of their agreement that all of the elements of perujry should enter into applications of the various persons who were to apply to enter the land desired. The pleader in this case undoubtedly was unconsciously influenced in his allegations by a realization that subornation of perjury was not the ultimate object of the agreement, and in stating what he assumed to be the agreement between the defendants he naturally omitted to set forth each element of the offense of subornation of perjury.

In this connection we cite the case of United States vs. Peuschel and Maid, 116 Fed. Rep. page 642.

In this case the defendants were charged by the indictment with a criminal conspiracy to defraud the United States by obtaining title and possession through homestead entry to mineral

lands not subject to entry. It was held that the fact that the land contained valuable minerals and knowledge of such fact by the conspirators at the time the conspiracy was formed are essential and must be averred in the indictment.

It was alleged that said Edward A. Peuschel and Frederick G. Maid then and there well knew that there were then and there within the limits of said land valuable mineral deposits; the Court held that from the words of reference used it was impossible to determine whether the defendants had the knowledge imputed to them at the time the conspiracy was formed or at the time of the filing of an affidavit thereafter made, or at the time of the filing of a homestead application; and this was fatal to the indictment. The indictment in the Pauschel and Maid case was infinitely better than the one under discussion as to the indictment could be construed to as to impute knowledge to the defendants at the time of the formaion of the conspiracy.

The indictment is utterly void of any allegation to the effect that the defendants intended that any one should wilfully take a false oath.

THE INDICTMENT IS VAGUE AS TO THE CHARACTER OF THE PROCEEDINGS IN WHICH AND THE TIME WHEN THE ALLEGD SUBORNATION OF PERJURY WAS TO TAKE PLACE, AND AS TO WHETHER THE INDICTMENT CHARGES THAT THE PROCEEDINGS IN WHICH THE ALLEGED SUBORNATION OF PERJURY WAS TO TAKE PLACE INCLUDED THE PROCEEDINGS AT THE TIME OF FINAL PROOF.

There is no doubt but that as a matter of law the proceedings should be pointed out in the indictment so that (among

other reasons) the defendants may prepare for their trial, and that the offense may be identified.

Our contention upon this point is mentioned in discussing the question of error in admitting evidence concerning final proof, and in giving and refusing instructions and in allowing the jury to base a verdict upon the theory that the indictment alleged a conspiracy to suborn perjury at the time of final proof. We argue the question there at some length and indicate our opinion as to what the indictment does charge.

In favor of the proposition that the indictment is fatally defective on account of its uncertainty in describing and characterizing the proceedings in which perjury is to be suborned, we cite the opinion of the two judges who tried this case. First, Judge DeHaven held that the proceedings at the time of final proof were not included in the proceedings wherein perjury was to be suborned.

Second, Judge Hunt held that the proceedings at the time of final proof were included and he allowed the jury to base a verdict on a conspiracy to suborn perjury at the time of and in the making of final proof.

Judge DeHaven overruled the demurrer challenging the indictment on the ground of uncertainty, among other things, and in this ruling Judge Hunt apparently concurred.

The two judges apparently agree in holding that the indictment was certain and definite, but they radically disagreed with each other as to what it meant.

In further support of the contention now being made we cite

Miller vs. United States, 133 Fed. Rep. 341.

Miller and others were tried under Section 5440 under an indictment charging a conspiracy to commit an offense against the United States.

The Court in undertaking to state how clear an indictment should be, uses the following language:

"When one is indicted for a serious offense, the presumption is that he is not guilty, and that he is ignorant of the supposed facts upon which the charge against him is founded. He is unable to secure and present the evidence in his defense—indeed, he is deprived of all reasonable opportunity to defend—unless the indictment clearly discloses the facts upon which the charge of the commission of the offense is based. It must set forth the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he has to meet, so fully as to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same crime, and so clearly that the Court, upon an examination of the indictment, may be able to determine whether or not, under the law, the facts there stated are sufficient to support a conviction."

It has been said by an eminent judge in effect that an indictment should be so clear that a person of ordinary understanding upon his arraignment by hearing the indictment read at that time can determine its meaning and prepare for its defense.

Measured by the test laid down in the Miller case, supra, the indictment under consideration is most certainly bad, as judges learned in the law differ as to its construction.

By the aid of counsel it would have been impossible for defendants to have determined even after two trials what charge they had to meet on the third trial under the same indictment.

We submit that the demurrer to the indictments should have been sustained, and that the judge who tried the case last should not have sent the defendants to trial for a third time upon a radically different charge from what they had already been twice tried, all three trials being had under the same indictment.

FURTHER, THE INDICTMENT DOES NOT IDENTIFY THE PARTICULAR OFFENSE IN THIS: THAT IT DOES NOT MENTION THE NAMES OF THE PARTIES TO BE SUBORNED, OR STATE THAT SUCH NAMES WERE TO THE GRAND JURORS UNKNOWN, OR THAT THE CONSPIRACY CONTEMPLATED THE SUBORNATION OF PERSONS THEN UNKNOWN TO THE ALLEGED CONSPIRATORS; NOR DOES IT IDENTIFY THE LANDS WHICH WERE TO BE ENTERED.

While a reading of the overt acts alleged leads one to the conclusion that the names of some of the persons to be suborned were known yet the overt acts cannot be referred to for the purpose of aiding the indictment in this respect.

See cases cited supra.

If the conspiracy was to suborn persons to be determined upon thereafter or whatever persons defendants might be able to procure to commit perjury the indictment should have so stated. We concede that the indictment need not be more specific than the conspiracy in its details, but this does not prevent the application of the rule contended for.

It should all the time be borne in mind that the conspiracy attempted to be charged here is a conspiracy to commit a statutory offense, each and all of the elements of which could be pointed out.

This point is of importance to the defendants as well as the

one last argued. If the charge relates to the time of final proof as the proceedings in which perjury was to be committed, it is an entirely different conspiracy from one relating to the time when application is first made and supported by different evidence. It would have assisted in identifying the offense if the indictment had alleged the names of the persons to be suborned or stated that they were unknown to the grand jurors or unknown to the conspirators at the time the alleged conspiracy was entered into.

That it is necessary to name the persons to be suborned if known or state that they are unknown, etc., see Section 1396, 2nd Vol. of Wharton on Criminal Law, 9th Ed.

For a concise statement of the law as to what constitutes uncertainty in an indictment under Section 5440.

See U. S. vs. Walsh, 28 Fed. Cases, page 394, case No 16636.

More laxity is allowed in cases charging a conspiracy to defraud than in a conspiracy to commit an offense against the United States.

IT IS FURTHER CONTENDED THAT THE INDICTMENT DOES NOT STATE AN OFFENSE IN THIS: THAT IT DOES NOT ALLEGE THAT THE STATEMENTS TO BE SUBSCRIBED AND SWORN TO BY THE PERSONS TO BE SUBORNED WERE TO BE TRANSMITTED TO THE REGISTER AND RECEIVER OF THE LOCAL LAND OFFICE, AND THAT THE CONSPIRACY SO CONTEMPLATED.

The Statute (see page 209 Supplement 1903, Compiled Statutes of United States, 1901) authorizing the administration by a U. S. Commissioner of oaths in application under the timber and stone act, provides that the proof, affidavit and oath when so

made and duly subscribed, shall have the same force and effect as if made before the Register and Receiver when transmitted to them with the fees and commissions allowed and required by law.

Thre is nothing in this indictment which charges that the witnesses were to subscribe affidavits, etc., that they might swear to or that the same should be transmitted to the Register and Receiver.

In order to be of any effect and be material, they must be so transmitted.

See State of Washington vs. Ed. Smith. 3 Wash., p. 14, and cases therein cited.

In the Smith case, supra, it is stated that under Section 867 Code 1881, an information does not sufficiently charge the crime of perjury for the making of a false affidavit when it does not allege that such affidavit is sworn to for the purpose of being used in some action or proceeding wherein by law such affidavit would be material, or by using or consenting to the use of such affidavit after being sworn to in such action or proceeding.

Section 867 referred in the decision reads as follows:

Sec. 867. Every person who, having taken an oath that he will testify, declare, depose or certify truly before any competent tribunal, officer or person, in any of the cases in which such an oath may by lew be administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury.

The indictment referred to is printed on page — of the record; the demurrer page —, the motion in arrest of judgment page — motion for new trial on page —, and assignment of errors No. 1 on page —, 135 on page —, 136 on page — and 134 on page —.

We submit that the demurrer to the indictment ought to have been sustained; that the motion in arrest of judgment and for a new trial ought to have been granted.

THE COURT ERRED IN HOLDING THAT THE CONSPIRACY ALLEGED IN THE INDICTMENT CONTEMPLATED THAT PERSONS WERE TO BE SUBORNED AT THE TIME OF FINAL PROOF AND IN ADMITTING EVIDENCE TENDING TO PROVE SUCH CONSPIRACY: THE COURT ERRED IN ADMITTING EVIDENCE TENDING TO SHOW PERJURY IN FINAL PROOF; THE COURT ERRED IN INSTRUCTING THE JURY THAT IT MIGHT BASE A CONVICTION ON A CONSPIRACY TO SUBORN PERJURY AT THE TIME OF FINAL PROOF.

It was error to consider the final proofs as it is not charged that the conspiracy involved subornation of perjury at that time, and (2) according to the allegations of the indictment the false statements on the part of the persons to be suborned was to consist in their swearing falsely that the land which they were applying to enter was not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the exclusive use and benefit of such applicants, and that they had not directly or indirectly made any agreement or contract in any way or manner with any other person or persons whomsoever by which the title which they might acquire from the United States in and to such lands should inure in whole or in part to the benefit of any person except themselves.

Under the law such oath was required at the time of the making of the written statement or application as it is called in the statute, but it was not required at the time of final proof by any statute of the United States. The two sections of the statute referred to being as follows (Pages 1545-1546, Volume 2, United States Compiled Statutes, 1901):

"Applications for purchase of timber and stone lands; false swearing; penalty.

"Sec. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desired to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnibar, copper or coal; that deponent has made no other application under this act; that he does not apply to purchase the same under speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part, to the benefit of any person except himself; which statement must be verified by oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury and shall forfeit the money which he may have paid for such lands; and all right and title to the same; and in any grant or conveyance which he may have made, except in the hands of bona-fide purchasers, shall be null and void.

Act June 3, 1878, c. 151, 2, 20 Stat. 89.

Publication of application for purchase; proofs, entry and patent; regulations.

Sec. 3. That upon the filing of such statement, as provided in the second section of this act, the register of the land office, shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper or coal; and upon the payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon; Provided, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Ef-

fect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commisisoner of the Genera' Land Office."

"Act June 3, 1878, c. 151, 3, 20 Stat. 90.

"Act May 10, 1872, c. 152, 12, mentioned in this section, is incorporated into Rev. St. 2334."

The first question for discussion is this: Does the conspiracy mentioned in the indictment involve the intention that perjury should be committed at any other time or in any other proceeding than at the time when the written statement should be made, which is the initial proceeding taken by an applicant to acquire land under the timber and stone act.

We contend that the subornation of perjury refered to in the indictment was to take place at the time of the making of said written statement.

We have heretofore cited the unpublished decision of Judge DeHaven in this matter assuming that it is entitled to as much weight as it would be if published.

We are not contending that the indictment is free from ambiguity or uncertainty, or sufficiently clear so that a demurrer to it should be overruled.

Indeed we could not well make such a contention in view of the variety of decision upon this indictment arrived at by men of much more than ordinary understanding. However, we contend if the indictment is held to allege anything with certainty it alleges that the conspiracy charged did not contemplate the subornation of perjury at the time of final proof.

We are led to this conclusion because the written statement which is made by the applicant, as his initiatory step in making his application, includes the very matters and things concerning

which it is alleged in the indictment perjury was to be suborned.

See Section 2 of the Act above quoted.

Further it is not charged in the indictment that there was to be any false statement made about any matter or thing which the statute provides shall be proved at the time of final proof.

The pleader copied from the statute the matter that must be included in the written statement and alleged that the conspiracy contemplated that a large number of persons should swear falsely with reference to these matters and things. Again, it is alleged that at the time when perjury was to be suborned the persons to be suborned would then be applying to enter and purchase in the manner provided by law, and a person who makes the written statement referred to in the second section of said act is by the statute denominated an applicant and his written statement made at the time of such application is denominated an application.

Upon reading the statute of the United States relative to this matter and the indictment it appears that no reference was made in the indictment to the proceedings necessary to be had under the statute at the time of final proof, it is not alleged in the indictment that the conspiracy contemplated that any person should swear falsely about any matter required by statute to be proved at the time of final proof.

A most careful scruting of the indictment will not reveal that it was in contemplation of the conspiracy alleged that any one of the persons to be suborned should ever make final proof or ever take any oath of any kind at that time.

A large number of overt acts are alleged to have been done by the defendant Biggs, and each of them consisted in making a written statement for the signature of the several applicants. The statute provides as above set forth for the making of a

written statement when application is made, which statement contains all the matters which were to be falsely sworn to under the allegations of the indictment. The statute does not provide that the applicant shall make oath at any other time to the matters contained in the written statement concerning which it is alleged perjury was to be suborned. On the other hand the statute provides just what shall be sworn to by the applicant at the time of final proof, which final proof must be made at least sixty days after the making of the written staement.. It is an entirely different proceeding, at an entirely different time, a proceeding at which other facts than those mentioned in the written statement are to be proved, and a proceeding in which none of the matters concerning whicht it is alleged, perjury was to be suborned are to be proved. We submit that it is clear as any thing that can be gathered from this indictment that the indictment does not charge that the alleged conspiracy intended to syborn perjury at the time of final proof.

It may at least be contended with propriety that an indictment means what it was construed to mean at two trials under it, and that if this indictment can be construed to refer to the time of final proof it is so vague in that respect that a large number of persons were decived as to the true meaning.

It is to be observed that there is a different penalty attached to false swearing under Section 2 from the prescribed penalty under Section 3, that under Section 2 in addition to the offending party being subject to all the pains and penalties of perjury he shall forfeit the money which he may have paid for the land and all right and title to the same, etc. No such penalty is provided in the 3rd section as against a person taking a false oath at the time of final proof.

We make the further contention that the Court erred in ad-

mitting testimony concerning the final proof, and in instructing the jury in such a manner that a verdict of guilty might be returned if the jury believed that a conspiracy was entered into to procure persons to swear falsely at the time of final proof, and the court erred in these particulars, even though this Court should be of the opinion that .the indictment undertakes to charge that persons were to be suborned at the time of final proof, for the reason that there is no law of the United States authorizing an oath to be administered to a person, at the time of final proof, concerning the matters and things, that the persons to be suborned are alleged to have sworn falsely about, under the allegation of the indictment.

As noted above, the statute provides that "Effect shall be given to the foregoing provisions of this act by regulations to be prscribed by the Commissioner of the General Land Office," and it is contended on the part of the government that the Commissioner of the General Land Office has by appropriate regulations provided that evidence shall be taken at the time of final proof to establish the truth of the matters that must be verified by the applicant in his written statement, and that the rules and regulations so promulgated have all of the force and effect of law, even for criminal purposes. The plaintiffs in error resist this contention and earnestly insist that a statute of the United States cannot be added to for criminal purposes by a departmental regulation.

In the first place, the only authority that is contemplated to be conferred upon the Commissioner of the General Land Office is to enable him by regulations to give effect to the provisions of this act. It was intended that by such regulations, effect should be given to what Congress had already enacted and there is no

intention manifest in the statute to confer upon the Commissioner the power to add to the congressional enactment.

Indeed Congress itself cannot delegate to any person or tribunal the powers which are legislative, and if it should attempt to do so it would be unconstitutional exercise of power, inasmuch as the legislative power of the United States is vested exclusively in Congress by the Constitution. The power sought here to be exercised by the Commisisoner is plainly legislative, because he has undertaken to add to the statute itself, and has determined what it, the statute, shall be, and what it shall contain.

See *Cincinnati W. & C. R. C. vs. Clinton County Comrs.* 1st Ohio. State 88.

Cooley's Constitutional Limitations, P. 137, 6th Edition.

If the Commissioner of the General Land Office has the authority to add the matter in question to the third section of the statute under discussion, he could add whatever else might seem to him best.

That no part of the legislative power conferred upon congress by the constitution can be delegated to any other department of the government is universally recognized as the law, and the only question that is involved here is this: Has the Commissioner in the making of the regulation referred to exercised legislative powers? If he has, whether authorized so to do by Congress or not he has overstepped his constitutional right. Again rules and regulations may properly be made by the various departments with which, persons dealing with the Department

in matters to which those regulations apply, must comply, in order to be heard or to obtain that for which they are seeking.

Such orders and regulations may have the force of law in a sense, but they do not have the force of law so that the violation of such orders render a person criminally liable. In order to render a person criminally liable he must be guilty of a violation of some penal enactment emanating directly from the supreme legislative power.

It is obvious that unless the regulation of the commissioner of the General Land Office has the force of a criminal act emanating from Congress, the plaintiffs in error in this case could not be guilty of a conspiracy to suborn perjury in a matter wherein it was contemplated that the persons to be suborned should swear falsely to matters which were not required to be proved by the statute, but only by a regulation of the department.

In support of our contention, we cite United States vs. Maid, 116 U. S., at page 650, wherein it is held that a criminal offense against the United States cannot be predicated on the violation of the requirements imposed only by a rule or regulation of one of the executive departments of the government, and that to constitute the crime of perjury under Revised Statutes 5392 by the making of a false affidavit in relation to entry of public lands it is essential that such affidavit should be material, and that it should be authorized by a law of the United States. Such a charge cannot be based upon an affidavit of the non-mineral character of the land made in support of a homestead entry, although a regulation of the land office requires such an affidavit to be made in certain cases, since it is not required by Revised Statutes 2290, which prescribed the contents of a homestead af-

fidavit, and the statute cannot be added to for criminal purposes by a departmental regulation.

The case of United States against Maid just cited is strictly analogous to the one under discussion, and we think is decisive of the contention that we are making.

We further cite in support of our contention United States vs. Blasingame, 116 U. S. 654, wherein it is held that the provisions of the sundry civil service appropriation Act of June 4th 1897. (30 Stat. 11), making it a crime to violate any rule or regulation thereafter to be made by the Secretary of the Interior for the protection of forest reserves, is void as in substance and effect a delegation of legislative power to an administrative officer.

It is said on page 652 United States vs. Maid, supra, that "A department regulation may have the force of law in a civil suit to determine property rights, as in Cosmos Exploration Company vs. the Gray Eagle Oil Company ,supra, and yet be ineffectual as the basis of a criminal prosecution. U. S. vs. Eaton, supra. The Supreme Court of the United States in the case last cited marks the distinction thus:

"Regulations prescribed by the president and by the heads of departments under authority granted by congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them; and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

In Dastervignes et al vs. United States, 122 Fed. Rep. p. 30 the Circuit Court of Appeals for the Ninth Circuit reached the

conclusion in a civil suit brought by the United States to enjoin the plaintiffs in error from herding and grazing sheep on the Stanislaus Forest Reservation, that the provision of the sundry civil service appropriation act of 1897 relating to forest regulalation and which authorizes the Secretary of the Interior to "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and preserve the forest thereon from destruction, and which itself prescribes the penalty for violation of such regulations, is not unconstitutional delegating legislative power to an administrative officer."

It is to be noted that the Blasingame case, supra, was a criminal one and the case of Dastervignes was civil, and the two decisions are to be distinguished upon that ground.

There is, however, a wide distinction between the last cited case and the one under discussion. In the last cited case the law itself prescribed the penalty for the violation of the regulations.

It is universally held that Congress cannot delegate its legislative power so as to authorize an administrative officer, by the adoption of regulation to create an offense and prescribe punishment for its violation.

Statutes are sometimes held valid which prescribe a punishment for the offense which in general terms is defined by the statute, the regulation dealing only with the matter of detail and administration necessary to carry into efffect the object of the law.

The Dastervignes case, supra, does not determine the question which we are discussing.

In the first place, the act above quoted provides in Section 3 thereof what is necessary for the claimant to prove at the time of final proof and continues *that on the transmission to the*

general land office of the papers and testimony in the case a patent shall issue thereon.

The applicant is entitled to his patent on making certain proof under the statute.

The regulation provides proof in addition to the statutory requirement.

Further, Congress has nowhere undertaken to provide that it shall be a crime to violate the regulations made or to be made by the Commissioner of the General Land Office in this particular, and it has nowhere undertaken to denounce as perjury false swearing with reference to matters which the statute does not require shall be proved at the time of final proof under the timber and stone act, but which are required only by a regulation of the department.

Neither has the Commissioner of the General Land Office undertaken, nor has he the authority, to provide by rule or regulation that a person shall be guilty of perjury in swearing falsely to matters required by him in final proof under the timber and stone act not required by the statute.

No penalty is attached to swearing falsely in final proof under the timber and stone act, except that the taking of a wilful false oath concerning matters required to be proved by statute is denounced as perjury under Section 5392 of the Compiled Statute.

It follows that the defendants, in order to be guilty of subornation of perjury, must have conspired to induce some one to take an oath before a competent tribunal officer or person in a case in which *a law of the United States authorizes an oath to be administered*, etc.

We have seen no decision which would tend to establish the proposition that the regulation of the commissioner of the Gen-

eral Land Office is a law of the United States within the meaning of the phrase as used in Section 5392.

It was urged at the hearing that the case of the United States against Bailey U. S. 9th Peters 238, 9 Law. Ed. 113, was authority in support of the contention that the rules made by the Commissioner of the General Land Office had the force and effect of a law of the United States within the meaning of the phrase as used in Section 5392, Revised Statutes. We do not so understand the case. In that John Bailey was indicted for false swearing under 3rd Section of Act of Congress of March 1st, 1823 (Chapter 165) which provides that if any person shall swear or affirm falsely touching the expenditure of public money, or in the support of any claim against the United States he shall, upon conviction thereof, suffer as for wilful and corrupt perjury.

The indictment charged the false swearing to be in an affidavit before a Justice of the Peace of the Commonwealth of Kentucky in support of a claim against the United States under the act of Congress of the 5th day of July, 1832 (Chapter 173), to provide for liquidating and paying certain claims of the State of Virginia. The Secretary of the Treasury had established a regulation immediately after the passage of the last mentioned act for the government of the department, and its officers, in their actions upon the claims in said act mentioned. And among other things provided that affidavits made and subscribed before any justice of any of the states of the United States would be received and considered, etc., and the question was whether the said Justice of the Peace had authority or jurisdiction to administer the oath or take the affidavit. The Court held that the Justice had jurisdiction to administer the oath, saying that the act of 1823 did not create or punish the crime of per-

jury technically considered, but it created a new and susbtantive offense of false swearing and punished it in the same manner as perjury.

The oath therefore ned not be administered in a judicial proceeding or in a case where the state magistrate under the state laws had judicial jurisdiction so as to make the false swearing perjury. It would be sufficient that it might be lawfully administered by the magistrate and was not in violation of his official duty.

There was no express authority given by any law of the United States to any state magistrate to administer an oath in a case like the Bailey case. The Court held that the Secretary of the Treasury by implication possessed the power to make such regulation and to allow such affidavits in proof of claims under the act of 1832.

The Court says, after setting out the customs of the department, that Congress must have been presumed to have legislated under this known state of the laws and usage of the Treasury Department. And the act of 1823 is construed with reference to this usage. It is held that the act does no more than to change a common law offense into a statutory offense, it being stated "that it is clear that by the common law that the taking of a false oath with a view to cheat the government or to defeat the administration of public justice though not taken within the realm, or wholly dependent upon usage and practice, is punishable as a misdemeanor. The defendant in this case (Bailey case) is not charged with perjury, but with a violation of the statute which provides a penalty for false swearing," it being held that Congress in providing this penalty legislated in accordance with the custom of the Treasury Department in requiring affidavits and designating state officers who had authority

to administer oaths within the state as proper persons before whom the affidavits could be taken.

This case is authority for the proposition that Congress may prescribe a penalty for false swearing in matters wherein it is the custom for the Treasury Department to receive affidavits in support of claims against the United States, the legislation on this subject assumes that evidence under oath will be submitted in support of the claims. In the Bailey case the Congressional act prescribed the penalty but did not denounce the offense as perjury. Under the common law it was an offense to file a false affidavit in support of a claim against the government, although taken outside of the realm, but the offense was not perjury, neither was it so made by the act above mentioned.

The proceeding in the Bailey case was under the statute creating the offense and not under the statute defining perjury.

In further support of our contention, we cite United States vs. Bedgood, 49 Fed., commencing on page 54.

Bedgood was charged with perjury and alleged to have been committed in making a pre-emption proof, and the Court in holding that the oath required was extra judicial in that the alleged false oath consisted in swearing falsely to matters not required by statute to be proven makes use of the following language:

See bottom of page 58, top of page 59.

Congress having expressly declared what officers are authorized to take affidavits and administer the oaths required by law in pre-emption entries and having expressly prescribed what statements the affidavit of the pre-emptionist shall contain, neither the commissioner nor the secretary has the legal authority to designate other officers before whom such oaths may be taken

or to prescribe the existence of other facts than those required by the statute. The law makes the existence of certain facts and oath thereof the only prerequisite to demanding a particular right, and oath of other facts in connection therewith, however false, is not perjury, and this is said on the theory that the commissioner may have made regulations prescribing what shall be contained in the affidavits.

In a late case arising in the District of Washington in a case wherein the United States was plaintiff and Ott and Williamson were defendants, Judge Hanford held that perjury could not be predicated upon an affidavit which is required only by regulation of the Interior Department; that perjury could not be assigned on such an affidavit. The case was tried before a jury and is not reported.

In the case of Caha, plaintiff in error, vs. United States, U. S., 152 U. S. 211, 38 Law. Ed. 415, the plaintiff in error was convicted of false swearing in a land office contest case with respect to a homestead entry; the Supreme Court affirmed a conviction on the ground that contest before the local land office had been recognized by Congress so that it was a competent tribunal.

The Court expressly says, that in the Caha case "No violation is charged of any regulation made by the Department. All that can be said is that a place and an occasion and an opportunity were provided by the regulations of the department, at which the defendant committed the crime of perjury in violation of Section 5392."

In the Caha case, although contests in a homestead entry had not been expressly provided for by statute, yet they had been recognized by congress, hence the tribunal was a competent one.

In further support of our contention, we cite

Morrill vs. Jones, 106 U. S. 466 467, 27 L. Ed. 267, 268.

In this case it is said that the Secretary of the Treasury cannot alter or amend a revenue law, and all that he can do is to regulate the mode of proceeding to carry it into effect.

U. S. vs. Eaton, 144 U. S., 677, 36 L. Ed. 591, is also cited.

This case holds that a dealer in oleomargarine is not guilty of a public offense on account of a violation of a regulation made by a Commissioner of Internal Revenues as the law itself did not prescribe the duties which the dealer failed to perform.

We quote from the opinion in the Eaton case the following:

It was said by this court in Morrill vs. Jones, 106 U. S. 466, 467 (27: 267, 268), that the Secretary of the Treasury cannot by his regulations alter or amend a revenue law, and that all he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. Accordingly, it was held in that case, under 2505 of the Revised Statutes, which provided that live animals specially imported for breeding purposes from beyond the seas should be admitted free of duty, upon proof thereof satisfactory to the Secretary of the Treasury and under such regulations as he might proscribe, that he had no authority to prescribe a regulation requiring that, before admitting animals free, the collector should be satisfied that they were of superior stock, adapted to improving the breed in the United States.

Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act

committed or omitted "in violation of a public law, either forbidding or commanding it."

4 *Am.* & *Eng. Enc. Law*, 642; 4 Bl. Com. 5.

See further

U. S. vs. Certes, 107 U. S. 671 (27:334).

U, P, Co, Manion 48 Fed 800

The foregoing cases discuss the general question involved and furnish numerous illustrations of the application of the principal contended for, and we think are sufficient to establish our position.

The prosecution endeavored to show that there was a conspiracy on the part of defendants to suborn perjury at the time of final proof, and the bill of exceptions is full of this evidence.

The Court also instructed the jury in such a manner as to authorize it to base a verdict of guilty if they should find a conspiracy to suborn perjury at the time of final proof raised by assignment of error 101, the instruction complained of being found on page — of the record.

Another instruction to the jury under assignment of error 100 found on page — of the record raised a like question.

And again a like instruction under assignment of error 101 found on page — of the record.

The Court refused to give the following instruction in this case:

"The indictment charges conspiracy to suborn perjury in the matter of the sworn statement or application and not in the matter of final proof."

This instruction is found on page 1487 of the record.

The final proof of John Watkins was admitted in evidence. See page 381—388 of the record.

There was also admitted in evidence over the objection and exception of the defendant the final proof of a large number of persons, being of like tenor and effect as that of John Watkins, namely, Joel, Calavan, Christian Fuerhelm, Laura Biggs, Ora F. Parker, Sarah Parker, Robert G. Foster, Mrs. Foster, Josiah Graves, Monia Graves.

The Court admitted final proof and *cross-examination* of each of said persons and the cross-examination of the said John Watkins on final proof.

These objections are presented by assignments of error 22 and 43, and others, and are found on the following pages of the record. 382-515-828

It is useless to point out the evidence which the prosecution offered tending to show conspiracy to suborn perjury at the time of final proof as it involves nearly all of the witnesses, and there can be no question but that if an error was committed in this particular it was vital to the case, and should result in a reversal.

IT WAS ERROR FOR THE COURT TO CHARGE THE JURY AS FOLLOWS:

"THE CHARGE IN THE INDICTMENT IS THAT THERE WAS AN AGREEMENT BETWEEN THE DEFENDANTS GENERAL IN ITS CHARACTER TO SUBORN A LARGE NUMBER OF PERSONS TO COMMIT PERJURY. AN AGREEMENT TO SUBORN ONE OR TWO PERSONS ONLY WOULD NOT SUSTAIN THE INDICTMENT EVEN IF PROVEN."

The Court not only refused the above instruction, but gave one which implied to the contrary of the requested instruction. These questions are covered by assignments of error Nos. 105 and 121, and the instruction requested and refused is found on page 1480 of the record, and the one given is found on page 1453 of the record.

There was a large amount of testimony introduced bearing upon this question, and in many cases it was clear that no perjury was intended to be suborned, and in other testimony an inference might be drawn that perjury was to be suborned.

See the testimony of Calavan, page 557 of the record.

Calavan testified that he was told by Dr. Gesner that he was under no obligation to sell to him.

Again, the inference might be drawn from Ben Jones' testimony that the intention was that he should knowingly swear falsely.

See testimony of Jones, page 163 of the record.

In short, the testimony was of such a nature that the jury might have believed that the conspiracy involved the suborning of one or two persons. The evidence above referred to is given as a sample. The reference to testimony might be indefinitely ex-

tended without serving any useful purpose. The trial judge under this state of the evidence considered it to be the law that the defendants would be guilty if the conspiracy referred to one or two persons only. We submit that it would be an improper identification of a offense to charge that two or more persons conspired to suborn a large number of persons, to-wit, 100 persons, if in fact the conspiracy referred to only one or two.

Any person reading an indictment charging defendants with conspiracy to suborn one or two persons, and another indictment charging the same persons with a conspiracy to suborn a large number of persons, namely 100, would understand that different conspiracies were referred to.

A conspiracy to suborn one or two persons is not a conspiracy general in its nature, but limited, while the conspiracy charged in this case is general and involves an agreement to suborn 100 persons.

See Wharton Criminal Law, Vol. 2, 1396, 9th Ed.

ERROR IN PERMITTING THE WITNESSES TO GIVE THEIR "UNDERSTANDING" AS TO THE ARRANGEMENT BETWEEN THEM AND GESNER ABOUT LAND.

A number of applicants, after detailing the conversation between them and Dr. Gesner about taking up the land, were permitted over the objection of the defendants, that it was incompetent, immaterial and called for conclusions of the witness, to give their inferences or understanding as to the effect of the arrangement.

The following are samples of these examinations: Christian Feuerhelm who was one of the applicants (after testifying to the application, etc.), and the talk with Gesner, was asked the following question: "What was your understanding when you you left Gesner and when you filed on a clai mas to whether you had promised that you would let him have it when you got the title?"

A. Well there was no real promising.

Q. You didn't say that?

A. No, sir.

Q. *But what was your understanding as to what you believed and what he believed?*

To which the defendants objected as incompetent and immaterial, calling for a conclusion of the witness and not binding upon the defendants, but the objection was overruled and the defendants excepted and the witness answered, "I believed nothing else, but I went in to file on the claim."

Printed record page 375

So the witness Calavan after having testified that he was a school teacher and lived in that locality and after having related in detail the talk he had with Biggs before he went up to see Gesner, testified as follows:

Q. "Did you have any talk with Mr. Gesner before you filed?

A. Yes, sir.

Q. Where was that?

A. That was, I think, on the street, near the First National Bank.

Q. In Prineville?

A. Yes, sir.

Q. And when was it with reference to the day you filed?

A. Why, I think it was a day or two before I filed.

Q. Now, what was that talk?

A. Why, I asked him—I hadn't made any talk with him about the proposition, and I was asking him about what he would do, and he said the claim would be worth $500, or he would give $500 for it when patent issued. But he says 'you will be under no obligation to sell to me.'

Q. What further was said?

A. That was all, I think. That is all I remember.

Q. Was anything said about the mortgage?

A. Yes, I believe there was. I think I asked him if he wanted a mortgage, and he said he didn't want a mortgage on our claims. I told him if he did, why, I wouldn't locate.

Q. Was anything said about why he wanted the claim filed on?

A. Why, I think he told me that he wanted to protect his range from other stockmen."

He was then asked this question:

"What was *your understanding* at the time as to what the terms were on which you were taking it up?"

To which the defendant objected as calling for a conclusion of the witness and incompetent and not binding on the defendant in any way, but the objection was overruled and the witness answered:

"Why, I understood that I was to receive $500 for the claim when the patent issued."

Q. "And it was your intention at the time you were making that filing to convey it for $500 as soon as you got the patent or what was your intention in respect to it?

A. My intention was to convey it to them when I got the patent.

Q. To whom?

A. To Gesner."

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The witness Crane, having testified as to the talk with Gesner in detail and as to his intention to let Gesner have the land, was asked this question:

"What was *your understanding* as to whether you had promised to do that or not?"

To this defendants objected and the Court ruled that he might state his belief, to which ruling the defendant excepted and the witness was then asked:

"What do you believe?"

To which the defendants objected as irrevelant, incompetent and not binding on the defendants in an yway, but the defendants' objection was overruled and defendants excepted, whereupon the witness answered:

"Well, I would have felt that way If I had went ahead and

proved up on the land and they had furnished me the money to do it with."

Whereupon the witness was asked the following question: "Was that your understanding of it?"

To which the defendants objected as calling for the understanding of the witness, but the objection was overruled and the defendants excepted, whereupon the witness answered:

"Yes, sir." Printed record page 358

So the question was asked of witness Hudson:

Q. "What did you understand at that particular time as to whether you had agreed to sell it to Gesner or not?"

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It is submitted that it is too well settled to admit of any serious question that this was error and that a witness cannot be permitted, after giving his statement as to what was said and done, toadd to it his inference or conclusion or understanding as ttohe effect of what was said.

In Whitemore vs. Ainsworth, a California case in 38 Pac. 196, the witness had stated a conversation and then was asked:

Q. State whether or not defendant wanted you to do anything?"

Held properly excluded as calling for a conclusion, the Court saying:

"The action of the Court in confining the witness to a statement of facts as they occurred rather than an expression of opinion as to what was wanted, was proper."

In the very late Indiana case of Deal vs. The State, 157 Ind.

549, 62 N. E. 51, the following question was asked of a witness who had heard a conversation:

Q. "What was *your understanding* from the conversation between Leach and Deal and yourself as to what relation he bore to this woman, whether husband or otherwise?"

The witness answered, "Well, I got the understanding that they were man and wife."

The Court says:

"In permitting this witness to give to the jury his mere understanding which he obtained from the conversation referred to in the question propounded by the State, counsel for the appellant contended that the court erred. In this contention we concur * * * It would seem unnecessary to refer to authorities in support of the well settled rule that a witness, as a general proposition, must be confined to the statement of facts and cannot be permitted to indulge or give in evidence *his mere conclusions, opinions or understanding.* It was the privince of the witness under the circumstances, to state th the jury what was said by the appellant or in his presnce in respect to the subject in issue and leave it to the jury to draw their own inferences from his statement:

In State vs. Brown, 86 Ia. 121, 53 N. W. 92, the witness had been permitted to give his understanding from a conversation about which he had testified. The court held it incompetent and irrevalent, saying:

"The understanding of the witness may not have been justified by the language used, between the defendant and in no view of the case was it properly received in evidence."

So in Plano vs. Kautenburg, 96 N. W. 734, decided by the same court in 1903, the witness had been permitted to state that the defendant "understood fully" in relation to his representa-

tions, giving his reasons therefore, and this was held incompetent and the judgment reversed.

In Crowell vs. Bank, 3 Ohio St. 411, the witness had been permitted to give his understanding of a conversation between the parties, and the court says:

"It appears that the plaintiff belo wwas not content with the statements of the defendants tending to maintain the action; but after the witness had related the conversation of the parties, he was further interrogated, and required to state his *understanding* or *inference* from the conversation, as to the *understanding* or *meaning* of the parties. * * * But to allow a witness, after having narrated a conversation of one of the parties, to be interrogated (and that, too, by the party calling him, notwithstanding the objection from the other side), and to state his consclusion or understanding from the conversation as to the meaning or understanding of the parties holding the conversation, would be a *most dangerous relaxation of the rules of evidence,* unwarranted by any reported decision which has fallen under our observation."

In Hewitt vs. Clark, 91 Ills. 608, the Court says:

"The safe mode of proving an agreement by parol is to require the witness to state what was said, if anything, by either of the parties in the presence of the other on the subject If a witness cannot give the words of the party he may undoubtedly be permitted to state the substance of what was said. He ought not, however, to be allowed to substitute his inferences from what was said or his understanding. To permit a witness to answer such a question, 'it is my understanding, etc.,' is erroneous."

To the same effect are Peterson vs. State, 47 Ga. 524; Shepherd vs. Pratt, 16 Kan. 211; Whitman vs. Frees, 23 Maine

187; Ives vs. Hammond, 5 Cush. 535; Peerless vs. Gates, 61 Minn. 124; Brady vs. Brady, 16 N. H. 431; People vs. Sharp, 107 N. Y. 461, 14 U. E. 319; Goodman vs. Kennedy, 10 Neb 2774.

And this has been the universal holding of the Federal Courts.

In Foster vs. Murphy, 135 Federal 51, Cox, judge, delivering the opinion of the Circuit Court of Appeals for the Second Circuit, says:

"After having exhausted himself as to what was said it was clearly incompetent for him to characterize the testimony. Whether a new contract was made was a question for the jury and not for the plaintiff to answer."

In Re Weisenburg, 131 Fed. 524, the question was asked of a cashier of a bank as to whom credit was given in a certain transaction. The Court says:

"The question as to whom credit was given and from whom payment was expected could be determined only from the facts of thetransaction, i. e., what was said and done before and at the time the notes were executed and discounted. It would not be affected by any testimony of Discoll as to what *his notions in regard to the matter were.*"

In Gentry vs. Singleton, 128 Federal 680, one Cooner had sold certain cattle and the question was as to whom he had sold them. He had stated what was said and done and then he was asked the question, "Who *did you understand* you were selling the cattle to?" This was held improper, the Court saying:

"The inference or understanding to be drawn from what occurred at that time is to betermined by the court or jury, and the unexpressed thought or understanding of the witness was wholly immaterial."

There never was a case in yhich the understanding of a witness was more dangerous or prejudical than this one. These witnesses, according to the theory of the government, had committed perjury and were subject to an indictment at the will of the government. There was every inducement for them to make their testimony satisfactory to the government. They should have been confined to a statement of the facts to what was said and done. Their undisclosed and unexpressed understanding was in no way binding upon the defendants. It was evident that many of them had no clear idea as to the transaction.

The line between an honest transaction and a dishonest one in the dealing with timber land is a fine one and largely involved. The court below held, and properly so under the authorities, that a man has a right to let it be known in a locality that he is in the market for timber and the price which he is willing to pay—to induce locators to take up timber and loan them money for that purpose so long as re does not make an actual contract to purchase the land.

And the locator on the other handhas a right to take the land with the intention of selling it to a purchaser and even with a prospective purchaser in view, as long as he makes no actual contract.

U. S. vs. Budd, 144 U. S. P. 154.

A man might be perfectly honest in his attempt to follow the law and might indeed keep squarely within the law in what he had a right to do and yet the line is so close that the misunderstanding of an applicant as to what the effect of the

transaction really was, might readil ythrow it over the line from an honest to an apaprently dishonest transaction.

For all these reasons it was vital that the actual facts should be presented to the jury, and that the jurors and not the witness should draw the inferences as to what the transaction really was.

ERROR IN PERMITTING WITNESSES TO STATE THEIR UNDISCLOSED INTENTIONS AT THE TIME OF MAKING THEIR APPLICATIONS AND AT THE TIME OF FINAL PROOF.

Each of the applicants were permitted to state, over the objection of defendants, what *his intentions* were as to the disposal of the land.

When the witness Ben Jones was on the stand after testifying to the talk with different defendants, and as to what was done, he was asked:

"Now, at the time you signed it and swore to it(the application) did you intend to convey this land to *Dr. Gesner* for the

consideration named by him to you, as testified by you, as soon as you obtained the title thereto?"

To which the defendants each separately objected as incompetent and immaterial and not binding upon them in any way. The objection was overruled and the witness answered:

"Yes, sir." Record page 161

And, again, in relation to the final proof, the witness was asked:

"Mr. Jones, at the time you subscribed this final proof paper, what was your intention with reference to this land as to what you would do with it when you obtained title?"

And was permitted to answer:

"Let Gesner have it." Record page 161

The witness Evans, who was also an applicant, was asked the following question:

"Now, at the time you signed that paper, what was your intent as to what you would do with the land when you secured a patent to it?"

To which the defendants objected on the ground that it was incompetent, immaterial and not binding upon them. The witness was permitted to answer:

"Well, of corse, I calculated to sell it and I supposed that Mr. Gesner would take the land."

Q. "For what consideration?"

A. Well I supposed he would give me $500 for it.

Q. Was it your intention at the time you signed to carry that out?

A. Well, I intended to take that for it if I could not get anything more out of it.

Q. Did you tell him that?

A. No, I didn't." Record page ——

So the witness Fauerhalm when on the stand was asked:

"At the time you filed, did you intend to let Dr. Gesner have the land when you got the title?"

To which defendants objected as incompetent, immaterial, calling for a conclusion of the witness and not binding upon them. The objection was overruled and the witness answered:

"I guess I thought so.' Record page 516

East of the applicants were asked similar questions.

Testimony of Beard, page 224

Testimony of Watkins, page 286

Testimony of Calavan, page 352

Testimony of Hudson, page 461

Now, if the charge had been perjury, or subornation of perjury, there might have been some reason for this proof, as the intention of the parties might have become a substantive element of these offenses. But here the crime, if committed at all, was the *prior combination and agreement.*

It was not what the *applicant* intended at the time of his application, but what the *defendants intended*—what they had previously planned—if any thing, which controlled.

The actual commission of perjury was in no way an element of the offense charged.

Of course, the acts of the conspirators *themselves*, in carrying out the conspiracy, are always proper—either as overt acts or asthrowing light upon their original intention or plan.

But as we have said, it was *their* intention and not that of the applicant which was material in this case.

The intention of the applicant was the product of his own brain, sequestered in his own mind, and whether good or bad, the defendants' *prior plan* could not be judged thereby. If the applicant disclosed his intention to the defendants, then what he said and done—in their presence and with their knowledge—might beevidence against them, because it colored their own acts and thereby threw, perhaps, a back light upon their original intention and plan.

But the unexpressed intention of the applicants rested in their own hearts, and the defendants ought not to be made responsible therefor.

If any of the applicants had a corrupt intent to commit perjury, the defendants could not justly be prejudiced thereby or found guilty of a previous plan, because of such subsequent and unexpressed intent of the applicant.

THE COURT ERRED IN ADMITTING EVIDENCE AS TO THE ALLEGED FALSITY IN THE APPLICATIONS OF THE VARIOUS PERSONS, THAT THE INDICTMENT ALLEGES PLAINTIFF IN ERROR WAS TO SUBORN, TOUCHING THE QUESTION OF WHETHER THE LAND APPLIED FOR WAS MORE VALUABLE FOR TIMBER OR OTHER PURPOSES. THE COURT ALSO ERRED IN ADMITTING EVIDENCE TENDING TO SHOW THAT THE LAND THAT EACH OF THE DEFENDANTS APPLIED FOR WAS LESS VALUABLE FOR TIMBER THAN FOR GRAZING PURPOSES.

Over the objection and exception of the plaintiffs in error the government was allowed to introduce evidence tending to show that the timber was of comparative small value upon the land applied for by the various entrymen, whom it was alleged plaintiffs in error sought to suborn.

Th evidence introduced on this question bore upon the truth in the written statement and final proofs introduced in evidence.

Evidence was introduced tending to show that most if not all, of the land described in the indictment, wherein the alleged overt acts of Biggs are set out, was less valuable for timber than for grazing purposes. We insist that this was error, inasmuch as the indictment not only did not charge that there was any conspiracy involving the subornation of perjury concerning the character of the lands to be entered, but on the contrary it was alleged that the various applicants at the time perjury was to be committed would be applying to enter and purchase the land which would be open to entry under the acts of Congress approved June 3rd, 1878, and August 4th, 1892, *and known as timber and stone lands*, the point of the evidence being that the

land was more valuable for grazing purposes than for its timber.

It is to be borne in mind that the evidence under consideration was offered in order to establish in some way the truth of the charge contained in the indictment that the defendants conspired to have persons swear falsely when applying to enter lands more valuable for timber and stone than for other purposes, and that the false oath to be taken in the contemplation of the conspiracy consisted in the statement that the applicant was applying to purchase for his own use and benefit, etc.; that he had not made a contract whereby the title might inure to the benefit of any other person or persons, when in truth he had made a contract whereby the title should inure to some other person.

There are three sets of persons referred to in the proof tending to show that the land was less valuable for timber than for other purposes, namely, the nineteen persons who are mentioned in the indictment wherein it is charged that Biggs committed an overt act in preparing a sworn statement for the signature of each of said nineteen persons. It being alleged that each of said nineteen persons was a person to be suborned; second, persons who were to be suborned, but unmentioned in the alleged overt acts of Biggs; third, the defendants themselves, Biggs, Williamson and Gesner.

The conspiracy itself according to the allegation, contemplated that subornation of perjury should take place only when *lands subject to entry under the timber and stone acts were being applied for.*

The defendants were convicted upon evidence which bore upon the question of whether or not there was a conspiracy to suborn perjury in proceedings wherein persons were applying to enter lands under the timber and stone act, which were not subject to entry under that act.

The government was allowed to secure a conviction on one charge by evidence tending to show another offense.

The government could convict only by showing that some one of the overt acts charged against Biggs was actually committed by him for the purpose alleged. It offered evidence tending to show that the land described in the alleged overt acts was of less value for timber than for other purposes, that is, it offered evidence tending to show that the land therein described was not subject to entry under the timber and stone act.

How, under the contention that the government was making, could the jury have found that the alleged overt acts were committed by Biggs for the purpose of effecting the object of the conspiracy, which involved subornation of perjury only in the entry of lands subject to entry under the act?

As to the persons whose names were not mentioned in the overt acts but who were to be suborned according to the contention of the government, we have to say, that the evidence on the part of the prosecution shewed that the conspiracy as to them involved subornation of perjury in an application to enter land not subject to entry under the timber and stone act, and consequently could not have referred to the charge in the indictment, and yet this evidence was submitted to the jury on the theory that it in some way tended to prove the charge in the indictment, and further the theory of the government's case at other times, was that a conspiracy to suborn perjury in applying to enter lands not subject to entry was the conspiracy charged in the indictment.

The evidence that bore upon the character of the land entered by the defendants themselves should be considered separately. There is no charge that the defendants had entered into a conspiracy to suborn themselves, neither is there any allegation

in the indictment that the defendants ever applied to purchase any land.

In the evidence complained of the government was allowed to offer testimony tending to show that the defendants did not enter into the conspiracy as alleged in order to establish a plan on the part of the defendants to do as alleged.

For defendants did not enter into the plan as alleged if, as contended by the government in this evidence, the land was not subject to entry.

This is not a case where evidence is offered of a different conspiracy in order to show the existence of the conspiracy charged for the land upon which the government sought to show there was little or no timber is the very land that the prosecution claimed was involved in the entries wherein perjury was to be suborned.

The legitimate effect of such evidence would be to show that the conspiracy upon which the proof bears is not the one for which defendants were on trial, but the real effect was to prejudice the defendants, and to permit a conviction on the charge in the indictment by permitting proof tending to show some other defense.

The jury might have convicted all of the defendants on the theory that they were guilty of conspiracy to suborn perjury in the entry of lands not subject to entry under the timber and stone act.

There is no necessity for a citation of authorities to support the proposition that an indictment charging a conspiracy to suborn perjury in proceedings wherein applications were being made to enter timber and stone lands subject to entry, is unsupported by proof of subornation of perjury in proceedings to enter lands not subject to entry under said act. An acquittal under one

In support of the proposition that the admission of such evidence is error, we refer the Court to that portion of our brief where a question of like nature is fully discussed.

The evidence introduced on the subject now under discussion is voluminious and consisted of photographs taken by witness McAlpin, whose testimony is to be found on page 626-649 of the record, and the testimony of witness Mitchell, whose testimony relating to this matter is to be found on pages 744-755 of the Record, and the testimony of witness Murray, whose testimony is to be found on pages 726-731 of the Record, and the testimony of witness Keenan, whose testimony relating to this matter is to be found on pages 1342 of the Record.

There is also other evidence on this same question shown by the Record, but the evidence of the witnesses named covers practically the whole subject.

Some answers covered whole townships, including much of the land applied for, like that of witness Keenan, page 1342 of the Record, when he testified to the general character of Township 15, S. 19, East(This township contains the land applied for by thirteen of the nineteen persons mentioned in the alleged overt acts of Biggs).

Witness Edgar made an answer covering a whole township on page 685 of the Record, whose testimony given at length on this subject, is printed on pages 682-717 of the Record.

The land was gone over by legal subdivisions and testimony given as shown by the record above referred to tending to show that the land was not subject to entry under the timber and stone act on account of the scarcity of timber and its value for grazing purposes.

As elsewhere mentioned, there were a large number of applications introduced covering the land concerning which the above tstimony was given touching the amount and the character of timber thereon, also a number of final proof papers were introduced in evidence, as elsewhere mentioned, covering a part of the same land.

There was a conflict in the statements contained in the said applications and final proofs on the one hand, and the above testimony on the other, as the applications each and all stated that the land was in effect subject to entry under the timber and stone act and the final proofs supported the applications in this particular.

ERROR IN THE ADMISSION OF EVIDENCE TENDING TO SHOW THAT ONE OR MORE OF THE DEFENDANTS HAD FRAUDULENTLY ACQUIRED SCHOOL LANDS, INCLUDING (1) ITS COMPETENCY, (2) ITS ADMISSION IN REBUTTAL, (3) THE RECALL OF THE DEFENDANT GESNER AND HIS CROSS-EXAMINATON IN RELATION THERETO AFTER THE STATE HAD ENTERED UPON ITS OWN REBUTTAL CASE, (4) IMPROPRIETY OF SUCH EVIDENCE FOR THE PURPOSE OF IMPEACHMENT.

The prosecution was permitted over the objection of each of the defendants to offer evidence against defendants Gesner and Williamson, tending to show the defendant Gesner had tried to induce one Perry to apply to the State of Oregon for school land for his benefit, and also evidence tending to show that he had induced one Mary Swearingen to file on state lands and that she had made the necessary affidavit and filed on the land and afterwards transferred it to *their* firm.

This evidence was offered as *rebuttal* and upon the theory of impeachment of the witness Gesner, and for the alleged purpose of laying a foundation for impeachment in that regard, said defendant was recalled and compelled to take the stand and testify in relation thereto in cross-examination, *after the defendants had rested their case and the prosecution had entered upon its rebuttal.*

In relation to the Perry incident, Mr. Perry being called in rebuttal, was asked the following questions and the following proceedings were had:

Q. Mr. Perry, in Prineville, between the 15th and 25th of June, 1902, did Dr. Gesner ask you to sign a school land application and an assignment to the firm of Williamson, Wakefield & Gesner or Williamson & Gesner, and did you ask him where the land was, and did he tell you it was up in the Horse Heaven country; and then did you ask him what there would be in it for you, and did he answer $50? And did you then tell him if you took up any school land, you would keep the land for your own use, and did you start t o walk off, and did he then say, it would be no trouble, "All you would have to do would be to go to the office and sign a paper."

Mr. Bennett: We object to that as incompetent, immaterial, not proper rebuttal, and not a proper impeaching question, not inconsistent in any way with the testimony he has given on the stand in his direct case, and therefore not a proper subject for impeachment; and because there is no sufficient foundation laid, because there was no statement in the question asked of the witness (Gesner) as to who was present, and no definite statement as to the time when it occurred.

Objections overruled: defendants except.

A. I had a conversation with Dr. Gesner, but I am lost as to the date; I could not say as to the date you speak of.

Q. How do you fix the date, how near do you fix the date?

A. Well, my impression is that it was in June, 1902, but I am not positive.

Mr. Bennett: What was that last?

A. I believe that it was in June, 1902, that the conversation was had between Dr. Gesner and me.

Q. Is it your best recollection that it was in the latter part of June?

Objected to as leading.

A. It was sometime between the 10th, 24th or 25th; somewhere about that time.

Q. Now answer the question.

Mr. Bennett: I renew our objection, that the foundation has not been laid and for the other reasons.

Objection overruled; defendants except.

A. The conversation that occurred between Dr. Gesner and myself occurred in front of Temple's drug store. He asked me this question, "if I didn't want to take up a piece of school land?"

Mr. Bennett: We object to that as not proper.

Objection sustained.

Q. Answer yes or no, if you can, as to whether that conversation I have repeated took place in substance—that conversation in substance and effect?

A. Yes, sir, it did.

Mr. Bennett: We move to strike out the testimony of this witness upon the grounds as are stated in the objection heretofore made.

Objecions overruled; defendants except.

Record Page 1316

In relation to the Swearingen matter Mrs. Swearingen was called as a witness and shown an application to purchase the school land in question from the State of Oregon. This application was not sworn to before Biggs, but before J. J. Smith, County Clerk, Crook County, Oregon. The affidavit attached was as follows.

State of Oregon,

ss.

County of Crook.

I, Mary J. Swearingen, being first duly sworn, say that I am over eighteen years of age; that I am a native born citizen of the United States; that the proposed purchase is for my own benefit and not for the purpose of speculation; and that I have made no contract or agreement, expressed or implied, for the sale or disposition of the land applied for in case I am permitted to purchase the same, and that there is no valid adverse claim thereto.

MARY J. SWEARINGEN.

(Signature of applicant.)

Subscribed and sworn to before me this 24th day of June, 1902.

J. J. SMITH,

County Clerk, Crook County, Oregon.

And was asked the following question:

Q. Will you state to the jury the circumstances under which you signed that paper, how you came to do it?

Whereupon each of the defendants objected upon the ground that it was immaterial ,irrelevant, tending to drag in collateral matters and not proper rebuttal. Whereupon the District Attorney proposed to limit this testimony to defendants Williamson and Gesner.

Whereupon the defendants Williamson and Gesner each objected upon these same grounds, and upon the ground that the defendants are charged with conspiracy between the three of them to suborn perjury in the matter of government land, and that this proof, referred to state land in which Williamson and Gesner were alone concerned and is entirely a separate matter in which it is only claimed that two of the defendants were concerned, and where any oath taken would be before some entirely

different officer; but the objection was overruled and to said ruling each of said defendants excepted; whereupon the witness answered:

"Well, there isn't much to it. The doctor just came down and asked me if I would file on a piece of school land; so I told him I would."

Juror: I can't understand you.

A. I say that he came and asked me if I would file on a piece of school land. I told him that I would. I went there and filed on the land. He was to give me $25 for filing on the 160 acres, as well as I remember; I don't remember just the amount. So I went before the County Clerk, Mr. Smith, and I filed on the school land.

Whereupon the following questions were asked and answered, subject to the same objection, ruling and exception:

Q. Now, just what did he say when he said he wanted you to file on it, just what did he say? Tell the whole thing.

A. Well, I don't remember just how it was.

Q. No; but the substance of it as you can recollect it.

A. Well, just as well as I remember, he came down and he said that he would give my daughter and I $50 to file on a quarter section or a half section—something—I don't remember the amount; but, anyway, when the time came and we went to the clerk's office, part of it had been taken or he didn't want part of it—something like that, or they didn't say it was for him at all. Just asked us to file on it. And so my daughter didn't file. I filed on it and he gave me $25.

Record page 1326

The prosecution also offered a copy of the application of one Mrs. Gerowe, a sister of defendant Gesner, to purchase state school lands. The application in this case was not filed or sworn to before defendant Biggs but before a notary public at Spokane, Wash. The affidavit was as follows:

State of Washington,

ss.

County of Spokane.

I, Sarah M. Gerowe, being first duly sworn, say that I am over 18 years of age, that I am a citizen of the United States, that the proposed purchase is for my own benefit and not for the purpose of speculation; that I have made no contract or agreement, expressed or implied, for the sale or disposition of the land applied for, in case I am permitted to purchase the same, and that there is no valid adverse claim thereto.

SARAH M. GEROWE.

Subscribed and sworn to before me this 26th day of June, 1902.

STANLEY HALLETT,

Notary Public in and for the State of Washington.

Record p. 1308

Also a certified copy of a deed from the State Land Board to Williamson, Wakefield & Gesner for the same land, bearing date the 12th day of August, 1902, and a certified copy of the letter hereinbefore specified.

The proceedings in relation to the cross-examination of Gesner and the foundation laid for his impeachment in relation to any of these matters were as follows:

After the defendants had closed their testimony and rested their case, the government called Mr. L. T. Perry as a witness on rebuttal, but before Mr. Perry had responded or taken the stand, the prosecuting attorney announced that he desired to recall the defendant Gesner, whereupon the following proceedings were had:

Mr. Bennett: As your witness?

Mr. Heney: No, I do not desire to call him as my own witness. I want to ask him one more question on cross-examination.

Mr. Bennett: In relation to what matter?

Mr. Heney: In relation to this letter of June 23. I forgot whether I asked him about that letter or not.

Whereupon the defendant on behalf of the defendant Gesner and the other defendants, objected to his being recalled for that purpose, but the Court ruled that he must take the witness stand, whereupon said defendants excepted to his being compelled to take the stand in relation to the matter at that time, and said witness took the stand in compliance with the order of the Court.

Q. Dr., I will ask you to examine that certified copy of those letters, and you can examine the certificate also. The letter referred to was as follows:

Prineville, Ore., June 23, 1902.

M. L. Chamberlain,

Salem, Ore.

My Dear Sir:

Inclosed find check for $80 payment on the west half of Section 16, T. 15 S. R. 19 E., containing 320 acres. My sister, Mrs. S. M. Gerowe, will forward the application as soon as she can sign it. Who has the SE 1-4 of that section. Is it paid

up on or is it subject to a new filing. Please let me know at your earliest convenience.

I remain,
Yours respect.
VAN GESNER.

To which said defendant Gesner and each of the other defendants then and there objected upon the ground that it is not proper cross-examination and not proper rebuttal, and because it compels the defendant to testify in relation to a matter after he has left the stand and his cross-examination closed, and the defendants' case rested. But the objection was overruled and said defendants and each of the defendants excepted. Whereupon the witness answered, "I guess I wrote that letter."

Q. You think you wrote that letter?

A. Yes.

Q. And received the reply that is attached there?

A. I don't remember the reply; I don't remember anything about that.

Q. But you remember writing the letter?

A. I remember writing some letters there.

All of which went in under the defendants' objection as aforesaid. The reply referred to is as follows:

June 25, 1902.

Van Gesner,
Prineville, Ore.

Dear Sir:

I am in receipt of yours of the 23rd instant enclosing draft for $80.00 first payment on the W. 1-2 of Section 16, T. 15 S. R 19 E. This tract is vacant. If application is received from Mrs. Gerowe before any other application is received for the land, certificate will issue to her, but if regular application is re-

ceived, accompanied by required deposit before application is received from Mrs. Gerowe, we will be compelled to issue certificate to the party so applying.

The S. E. 1-4 of this section was sold to E. W. Barnes certificate No. 12389 and this certificate is not subject to cancellation.

Yours truly,
M. L. CHAMBERLAIN,
Clerk of the Board.

Record pages 1306-1314

And thereafter one L. T. Perry was recalled on the part of the government in rebuttal, and was asked the following question:

Q. Mr. Perry, did you have a conversation with Dr. Gesner in Prineville, in 1902, in relation to school lands?

Thereupon the defendants objected to said question as not proper rebuttal and as irrelevant.

Whereupon the Court asked whether defendant had been asked on his cross-examination regarding this conversation.

Whereupon Mr. Heney said, "I do not recall whether I asked him that or not, your Honor. I aimed to ask him. I will ask permission to recall the doctor and ask that question now.

Whereupon said defendant, Gesner, and each of the defendants, objected to the witness being recalled at that time, after the defendants had rested their case and the government had entered upon the presentation of its case, as compelling the defendant to testify against himself, compelling him to be called as a witness without his consent and over his objection. But the objection was overruled, to which each of said defendants then

and there excepted, and their exception was allowed.

Whereupon said defendant Gesner was again placed upon the stand and asked the following question:

Q. "Doctor, in Prineville, between the 15th of June, 1902, and the 25th day of June, 1902, did you have a conversation with Lawrence T. Perry, in that conversation, did you ask him to sign a school land application and an assignment of the same to the firm of Williamson & Gesner or Williamson, Wakefield & Gesner, and state to him that the land was up in Horse Heaven country; and did he ask you how much there would be in it for him, and did you answer $50; and did he then say, if he took up any school land, he would keep the land for his own use, and walked off, and did you say, as he was walking off, that it would be no trouble, 'All you would have to do would be to go to the office and sign a paper,' or words to that effect?"

Thereupon said defendant, Gesner, and each of the defendants objected to the question on the same ground as to the recalling of the witness, and upon the further ground that the matter is immaterial, irrelevant, and no proper foundation for impeachment, and is not in any way inconsistent with anything the witness has testified to upon his direct examination, and therefore not a proper subject for impeachment. But the objection was overruled, and to said ruling each of the defendants excepted, and the witness answered:

"I will say I never had any such conversation with Mr. Perry as that, none whatever at any time, June, July or any time.

Whereupon Mr. Heney said, "That's all;" and the witness left the stand. Record pages 1309-1311

And thereupon after the witness had left the stand, Mr. Heney again asked the witness to take the stand in relation to another matter.

Whereupon there was the same objection to the recalling of the witness as before; same ruling and exception.

And thereupon the witness was again recalled, over his objection and asked the following question:

"On or about June 24, 1902, in Prineville, did you ask Mary W. Swearingen to file upon 320 acres of school land in section 16, township 16-19, in the Horse Heaven country and tell her that you would give her $50 if she would make the application and an assignment to Williamson & Gesner, or Williamson, Wakefield & Gesner, or words to that effect? Or, did you tell her you would give her $25 for filing upon 160 acres, at the same time and place?

Whereupon said defendant, and each of the defendants objected upon the same ground as in the Perry matter hereinbefore referred to, and upon the further ground that it was not proper rebuttal, immaterial, irrelevant, and an attempt to prejudice the defendant by bringing in other matters having no relation to the matters charged in the indictment. But the objection was overruled and to the ruling each of the defendants excepted; thereupon the witness answered:

"Why, I think she filed on a piece of land up there, but there was no contract to sell it to me. She was keeping boarders there, and there was a vacant place, and I told her she could make something out of that land by filing on it, and if she wanted to file on it, I would let her have the money, and I did let her have the money, I think, and she filed on the land, and I bought the land of her. But I had no contract with her before to buy, no specified sum or anything else."

Q. When did you buy the land from her, Doctor?

Mr. Bennett: I want our objection and exception to all this your Honor.

The Court: I understand it applies to all this testimony?

Q. You say you bought the land from her afterwards?

A. I think so; yes.

Q. How long afterwards?

A. I don't know; I don't remember.

Q. What did you pay her for it?

A. I don't remember what I gave her now.

Q. You put up the $200 to pay for the land to the state at the time?

A. Yes.

Q. Who did you turn that over to? J. J. Smith, county clerk?

A. I don't know whether I turned it over to him or let her have the money.

Q. Did you suggest to her that she buy it?

A. I might have spoken to her about it.

Q. You don't know when you got the deed?

A. No, I don't.

Q. And didn't you get it at the time she signed the application?

A. No, sir.

Q. When do you think you got it?

A. I could not say.

Q. Haven't you any idea?

A. No. I haven't, now

Q. Did you put it on record?

A. I think it is on record.

Q. When did you put it on record?

A. I could not say for that, either.

Mr. Bennett: It is understood our objection goes to all this, as to each of the defendants separately?

The Court: Yes.

Record Pages 1311-1313

The rule that, ordinarily and generally, evidence tending to show the difendant guilty of some other crime than the one on trial, will not be admitted is too well settled to admit of successful question.

The cases where evidence of other crimes have been admitted are exceptions. They are generally cases of passing counterfeit money, false pretenses, receiving stolen goods, etc., where the difficulty of proving the crime by any other means has led the Courts to a recognition of exceptions to the rule.

Another class of exceptions grow out of cases where the two crimes are so closely connected with each other as to make it impractical to fully prove the one without disclosing the other, or where both are a part of the same immediate transaction. But these are the exceptions and not the rule, and the Courts, properly, restrict them to very narrow limits.

Boyd 20 N.Y. 142 N.Y. 456

People vs. Sharp, 107 N. Y., 427.
People vs. Molineaux (N. Y.) 61 N. E. 286.
Comm vs. Jackson, 132 Mass. 16.
Shaffer vs. Comm, 72 Pa. St. 65.
Unsell vs. State, 39 Tex. 330, 45 S. W. 1022.
Walker's Case, 1st Leigh (Va.) 574.
State vs. Godfreson, 24 Wash. 398, 65 Pac. 523.
Schazer vs. State 36 Wis., 429.

People vs. Tucker, 104 Cal. 440; 38 Pac. 195.
McGee vs. State (Miss) 22 So. 890.
State vs. Spray, Mo. 74, S. W. 846.
Leonard vs. State, 60 N. J. Law. 8; 41 At. 561.
Cobble vs. State, 31 Ohio St. 100.
Ivan vs. Comm, 104, Pa. St. 218.
Long vs. State, Tex. 47, S. W. 363.
State vs. Raymond, 53 N. J. L. 260.
People vs. Fitzgerald, 156 N. J. 253; 50 N. E. 846.
State vs. Graham, 121 N. C. 623; 28 S. E. 409.
People vs. Bowen, 49 Cal. 654.
State vs. Walters, 45 Iowa, 389.
State vs. Stevens, 56 Kans. 720; 44 Pac. 992.
McAllister vs. State, 112 Wis. 496; 88 N. W. 212.
Barton vs. Briley (Wis.) 96 N. W. 815.
People vs. Elliot, 119 Cal. 593, 51 Pac. 955.
Bomer vs. Rosser, 123 Ala. 641; 26 So. 510.
White vs. B & F. G. Co., 65 Ark. 278; 45 S. W. 1060.
Jordan vs. Osgood, 109 Mass. 457.
People vs. Schuman, 80 N. Y. 373.
State vs. Bakren, 14 Wash, 403.
Coleman vs. People, 55 N. Y. 81.
People vs. Hurley, 126 Cal, 351; 58 Pac. 814.
State vs. Fichelle (Minn.) 92 N. W. 527.
Dave vs. State, 37 Ark. 261.
Enderly vs. State, 39 Ark. 278.
Shears vs. State, 147 Ind. 51; 46 N. E. 331.
State vs. Machernagel (Iowa) 91 N. W. 761.
State vs. Bates, 46 La. An. 849; S. C. 15 So. 204.
Pike vs. Crehon, 40 Me. 503.
People vs. Shweitzer, 23 Mich. 301.

State vs. Goetz, 34 Mo. 85.
State vs. Reaves, 71 Mo. 421.
Davis vs. State, 54 Neb. 177.
Chency vs. State, 7 Ohio 222.
Barton vs. State, 18 Ohio 221.
Galbraith vs. State, 41 Tex. 567.

The effort a late text writer (Wigmore) to reverse this proposition and make the exception stand for the rule and vice versa and to make it appear that upon one pretense or another, evidence of other crimes of the same general nature are nearly always admissible, can not prevail unless the Courts are ready to disregard the holding of learned judges representing the judicial experience of years, to accept the mere *theory* of a man who does not appear to have ever participated in the actual trial of a case either on the bench or at the bar, in his life.

We submit that this learned author's book is at least as remarkable for its iconoclastic tendencies, and for the freedom with which it runs amuck upon established principles and judicial holdings, and criticizes and overrules the decisions of the ablest courts and judges, including the Supreme Court of the United States, as it is for the evident industry and energy of the author.

We submit to the court that the rule, which requires the defendant in a criminal case to be tried solely upon the crime charged, is a good one and ought not to be frittered away upon any pretext.

We have always claimed that the protection of the innocent was quite as important in our courts as the conviction of the guilty—a principle that public clamor sometimes forgets, but which we trust our Courts to constantly assert.

We submit to the Court that nothing can be more dangerous

to an innocent man on trial than to have every act of a similar nature with which he may be justly or unjustly charged, paraded before the jury.

Even if he is guilty of the collateral crimes, he may still be perfectly innocent of the one for which he is actually on trial, and if he is innocent of the collateral offenses sought to be proved against him, he is in a majority of cases practically helpless. He has come prepared to meet the main charge as best he may, but how shall he prepare to meet two or three or any number of other charges of which he may be entirely innocent, and of which he has had no notice whatever. And yet he is compelled either to attempt to meet them and try each one of them out, as if it was the main fact, or else he must stand before the jury under the imputation of being an all round rascal, who was in the habit of committing such acts and was therefore likely to have committed the one on trial. It is no protection to have the Court learnedly charge the jury that they must only consider such evidence for certain purposes. They can not do this even if they each and all fully understand the charge (which is little likely) and honestly make the attempt. It is a human impossibility. The judge himself can not perform this mental feat, with all his judicial temperament and training. How much less the untrained mind of the average juror not accustomed to analyze or differentiate closely, but used to general reasoning and more or less general conclusions.

Even if he is more or less guilty of the other offenses charged, the defendant is not placed in a fair light before the jury.

His bad acts are selected out and arrayed before the jury. He has no right upon the other hand to meet them with proof of other acts of virtue and well-doing, and if he had the right it

would be impractical. The jury have before them, then, a man whose life from the samples presented to them, has been one of wrong and crime. And yet he may have been upon the whole, a fairly good man. Few are the specimens of poor humanity who could stand the test of having their good acts stripped away, and being judged entirely by the wrongs they may have committed and the bad they may have done.

There is no excuse for a rule which would permit this except that of actual necessity. It is impossible to prove the essential elements of a particular crime (as a rule) in any other way, then it may perhaps be justified, notwithstanding the danger to the innocent.

But the exceptions to the general rule, ought to be narrowed within the narrowest limits—not extended—and the rule ought not to be brushed away upon the theory that the evidence bears in some remote conjectural and fanciful way upon the question of motive or intent. Such an exception would wipe away the rule entirely, for motive and intent are always in issue in a criminal case.

That this is not the true state of the authorities is obvious from an examination of the long line of authorities cited supra.

In Commonwealth vs. Jackson, 132 Mass. 16, the defendant was indicted for his false representations as to the kindness and soundness of a horse. Evidence was offered and admitted that about the same time (within less than two months) the defendant had made practically the same representations in the separate sale of three other horses at different times, all of which was false. The evidence was admitted for the purpose of showing intent only and was carefully limited to that purpose. Judge Devens, delivering the opinion of the Court, says:

"The objections to the admission of evidence as to other

transactions, whether amounting to indictable crimes or not, are very apparent. Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it; and, by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him. It is a well-settled rule of the criminal law, that the general character of a defendant cannot be shown to be bad, unless he shall first himself attempt to prove it otherwise. It ought not to be assailed indirectly by proof of misconduct in other transactions, even of a similar description.

So in the case of People vs. Molineaux, 61 N. E. 286, it is said by Werner, judge, delivering the opinion of the court:

"The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged."

And O'Brien, judge, in a concurring opinion, says:

"It is said that the evidence culminating in Barnett's death tends to identify the defendant as the author of the death of Mrs. Adams; but that is only another way of asserting the general proposition that the commission by the defendant of one crime tends to prove that he committed another crime, and, no matter in what form or how often that proposition is asserted, or how persuasive and plausible it may appear, it is erroneous and misleading, since it violates a salutary principle of the law of evidence, which should be applied in all cases without regard to the question of actual guilt or innocence. If the guilty cannot be convicted without breaking down the barriers which the

law has erected for the protection of every person accused of crime, it is better that they should escape, rather than that the life or liberty of an innocent person should be imperiled. I think the evidence relating to Barnett's sickness and death would not for a moment be considered competent but for the fact that it creates a strong impression upon the mind that the author of his death must be the author of Mrs. Adams' death, since in both cases death was caused by similar means. We may attempt to deceive ourselves with words and phrases by arguing that it is admissible to prove intent, or identity, or the absence of mistake, or something else, in order to bring the case within some exception to the general rule; but what is in the mind all the time is the thought ,so difficult to suppress, that the vicious and criminal agency that caused the death of Barnet also caused the death of Mrs. Adams. The rule of law that excludes the evidence for such a purpose may be, and probably is, contrary to the tendency of the human mind; but, since the law was intended to curb the speculations of the mind, and to guard the accused from the result of error in its operation, I am for maintaining the law in all its integrity and not for undermining it by qualifications that rest upon no reasonable or logical bisis."

In the case of Paulson vs. State, a Wisconsin case, in 94 N. W. 771, the charge was murder *for the purpose of robbery*, and evidence of a previous *larceny* had been admitted ostensibly because defendant had explained his possession of money after the murder by claiming that he obtained it in the previous larceny. The Court says:

"From the time when advancing civilization began to recognize that the purpose and end of a criminal trial is as much to discharge the innocent accused as to punish the guilty, it has been held that evidence against him should be confined to the

very offense charged, and that neither bad character nor commission of other specific disconnected acts, whether criminal or merely meretricious, could be proved against him. This was predicated on the fundamental principle of justice that the bad man no more than the good ought to be convicted of a crime not committed by him. An exception is indulged in where other crimes are so *connected with the one charged* that their commission directly tends to prove some element of the latter—usually guilty knowledge, or some intent. We mention this exception merely for accuracy, to qualify the generality of the foregoing statement. It obviously can have no application to such remote and disconnected events as those here presented. The cases in which overzealous prosecutors have trespassed this rule, so that appellate courts have had occasion to give it reiteration, are almost without number."

Here follows citations to a large number of cases.

"The foregoing cases are referred to not so much to establish the rule that evidence of such remote acts is irrelevant, and therefore inadmissible, for that must be obvious at a glance. That one stole rye from some one in Minnesota in 1895 has no tendency to prove that he committed this murder in Wisconsin in 1898. They are cited more especially to *show how uniformly Courts have held that one cannot be deemed to have had fairly tried before a jury the question of his guilt of the offense charged when their minds have been prejudiced by proof of bad character of accused, or former misconduct, and thus diverted and perverted from a deliberate and impartial consideration of the question whether the real evidentiary facts fasten guilt upon him beyond reasonable doubt.* In a doubtful case even the trained judicial mind can hardly exclude the fact of previous bad character or criminal tendency, and prevent its having effect to swerve such

mind toward accepting conclusion of guilt. Much less can it be expected that jurors can escape such effect."

In the case of Boyd vs. United States, 142 U. S. 450, the defendants Boyd and Stanley were on trial jointly for the murder of one Dansby, claimed to have been committed in *an attempt to rob*. The tendency of the proof offered by the government was to show that the killing occurred in an altercation between the defendants and a man by the name of Davis (killed in the row) on the one side and Dansby, Butler and Joseph and Martin Byrd on the other, that the defendants and Davis were attempting to rob Martin Byrd, Davis presenting a pistol and demanding his money and that in the altercation which followed Davis and Dansby were killed.

The theory of the defendants on the contrary as outlined by their counsel, was that while they and Davis were at a ferry landing attempting to get across, they were attacked by the Dansby Byrd crowd, who were attempting to arrest them for previous robberies and that in the altercation which ensued, the Byrd crowd fired upon them and killed Davis and that their shooting was in self-defense of the assault.

The killing occurred on April 6th and the prosecution was permitted to prove that on the night of the preceding March 15th the defendant Stanley had robbed Brinson and Mode, and that on the 17th of March he and Boyd had robbed one Hall, that on the night of March 25th defendants Stanley and Davis robbed one John Taylor and that on the evening before the killing, the three, Davis, Boyd and Stanley, robbed Rigsby's store.

The evidence was admitted for the purpose of proving the identity of the defendants and especially of the defendant Stanley, and also for the purpose of showing that if the killing occurred in the course of an attempt to arrest as claimed by the

defendants, that the arrest was justified by the previous robberies.

The case was reversed, Chief Justice Harlan saying:

"No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. *Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue*, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the records, we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidnce, and only for the offense charged.

Perhaps there is no more instructive or clearer discussion and statement of the rule than the concurring opinion of Judge Peckham, now Justice of the United States Supreme Court, in the case of People vs. Sharp, 107 N. Y. 427; 14 N. E. 345. In this case the defendant was indicted for bribing a member of the Common Council of the City of New York with $20,000 to influence him in a matter of a franchise of the Broadway Railroad Company. Proof was admitted by the lower court tending to show that he had the previous year offered the engrossing clerk of the Assembly $5000 to alter a bill so as to give the railroad a franchise. It was held that the evidence was improperly ad-

mitted. Judge Peckham says:

"Under such conditions, and guided by such rules, it does not seem to me that this evidence by Pottle was so connected legitimately with the main transaction—that of the alleged bribery of Fullgraff—as in any way to characterize the intent with which the money was alleged to have been paid Fullgraff, in any other sense than the evidence tends to show capacity upon the part of the prisoner to commit the crime because he had, months before, attempted to commit one of a similar nature, with another person, for the purpose of accomplishing another act. *It is a very general, and extremely broad, and, I think, a dangerous, ground upon which to claim the admissibility of evidence of this character, to say that it tends to show that the prisoner was desirous of obtaining a railroad on Broadway that he was willing to commit a crime for the purpose of securing his object.* It seems to me this is nothing more than an attempt to show that the prisoner was capable of committing the crime alleged in the indictment becapse he had been willing to commit a similar crime along before, at another place, and for the purpose of accomplishing the commission of another act by a different person. *To adopt so broad a ground for the purpose of letting in evidence of the commission of another crime is, I think, of a very dangerous tendency.*. It tends necessarily and directly to load the prisoner down with separate and distinct charges of past crime, which it cannot be supposed he is or will be in proper condition to meet or explain, and which necessarily tends to very gravely prejudice him in the minds of the jury upon the question of his guilt or innocence. I do not think that evidence of the kind in question, and in such a case as is here presented, legitimately tends to enlighten a jury upon the subject of the intent with which money was paid many months thereafter to another person, at a differ-

ent place, and to accomplish the commission of another act. *It throws light upon that intent only, as it tends to show a moral capacity to commit a crime.. It gives, under the circumstances, entirely too wide an opportunity for the conviction of an accused person by prejudice, instead of by evidence showing the actual commission of the crime for which the defendant is on trial.*"

It is true that this decision is criticized and disapproved by Mr. Wigmore with his usual comfortable assurance. But we submit that it is entirely supported by the long list of authorities cited *supra* and is besides in line with the principles of common sense and enlightened justice and that the opinion of this eminent and experienced jurist will be a part of the law on this subject, when the theoretic book of the learned author will be dusty and musty with age and disuse.

It will be seen that the offenses against the State of Oregon and the offense sought to be proven were entirely independent transactions and these collateral offenses were only similar in the general nature of the offenses—that is, each related to the crime of perjury in the application for land—in all other respects they were entirely distinct.

The crime charged was that of a *conspiracy* to suborn perjury, in the matter of an application for *timber lands* of the Unit-

ed States. This conspiracy was alleged to be between *all three* of the defendants and the "conspiracy" was the sumstantive element of the offense and the perjury was charged to have been contemplated before Biggs, who was a United States Commissioner and alleged to be one of the conspirators.

The collateral crimes offered in evidence involved one, or at the most, two, of the defendants only. It was not even claimed that Biggs had anything to do with them, nor were they offered against him, so that it is entirely plain that the collateral crimes (admitting that they were committed) were an infraction of a different law against a different sovereignty involving the perjury of altogether different individuals from those charged in the indictment and in relation to different lands, before different officers, and involving an entirely different proposition, in which it was only claimed that a portion of the defendants shared.

It can hardly be claimed that this evidence was competent for the purpose of showing plan or design, because the transactions involved, as we have seen, different parties, different lands, a breach of different laws and an offense against different governments and would be too remote for this purpose under any of the authorities.

So it is difficult to conceive how it can be contended that it was proper for showing motive or intent. The only thing that could possibly be material for the purpose of showing motive would be the mere fact that some of the defendants owned other

land in that vicinity, and therefore, might wish to acquire the lands in question; but this is very remote and insufficient to justify the introduction of such testimony.

People vs. Sharp, 107 N. Y., Supra.

Besides, if this had been the purpose it would only have been necessary to have shown the facts as to the ownership of the land, the deed from the state, etc., and it would have been entirely unnecessary to have gone into all the details as to the alleged subornation of perjury in the state land matters.

Even when evidence of another offense is admissible the prosecution cannot be permitted to go into unnecessary details.

Martin vs. Commonwealth, 93 Ky. 189, 19 S. W. N. 580.

So the evidence was entirely too remote under the authorities for the purpose of showing intent, even if the intent did not speak for itself in this case. It would be very far fetched reasoning indeed, to say that, because a party had committed subormation of perjury by inducing one person to swear falsely in relation to one piece of land in a proceeding with one sovereignty, that therefore he intended to induce a different person to swear falsely in relation to a different piece of land before a different tribunal and in relation to the rights of a different sovereignty.

The act in the one case would only tend to prove the criminal intent in the other case, on the theory that the defendant, being a bad man, likely to commit crime and having a vicious intent in the one case, was likely to have a like vicious intent in the other case. And this would be simply saying that you could prove the one offense by showing that the defendant was a bad

man and therefore likely to commit the other. Opinion of O'Brien, judge, in People vs. Molineaux, and Peckham, judge, in People vs. Sharp, Supra.

Besides, the acts charged in this indictment, if proven, spoke for themselves and needed no other evidence of intent. The charge was that the defendants had themselves made contracts (or were to have made them) with these applicants to transfer the land to them and then were to induce the applicants to swear that they *had made no such contract.*

If this was true, there was no room for any question about the intent. If these applicants had made contracts with *these defendants* and these defendants induced them to swear that they had not made any such contract, it is perfectly plain that the intent to have them swear falsely existed as a matter of necessity.

It was one of those cases where the act spoke for itself. We submit therefore that the only sogency of this proof, as stated by Judge O'Brien in the Molineaux case, was to show that the defendants were bad men who had committed other offenses of the same character and were therefore likely to have committed this crime. It is said that such proof is admitted in France and perhaps in some other countries, but, however plausible it may seem to theorists, we submit that it has never yet been admitted in any court in this country, and we submit further, that while such a rule might tend in many instances to insure the conviction of the guilty, it would also involve the innocent in griveous danger—such danger as would far overbalance any good that might come from the rule.

We submit, therefore, that this testimony was incompetent and inadmissible for any purpose or at any time.

NOT PROPER REBUTTAL.

But the manner in which this evidence was introduced made it still more inadmissible—still more dangerous.

If such testimony was admissible it was plainly a part of the prosecution's *direct case* and was not admissible in rebuttal. Then the defendants would have had more time and better opportunity to have met and disproved, justified, excused or explained these alleged collateral offenses, but it was held back and only disclosed to the defendants in the rebuttal case at the end of a long and tedious trial and but a few hours before the case was submitted to the jury.

We submit, therefore, that this accentuates the error in admitting the evidence at all, and makes the prejudice to the defendants essentially greater even, than it otherwise would have been.

NOT PROPER CROSS-EXAMINATION OF DEFENDANTS.

In order to lay an apparent foundation for the introduction of this testimony in rebuttal the defendant Gesner was recalled and compelled to testify in relation to these matters *in cross-examination*, after the defendants had rested their case and the government had entered upon its rebuttal.

Gesner had not testified at all in relation to these collateral matters on his direct examination, and, indeed, had not been asked at all about them up to the time he was compelled to take the stand for such re-cross-examination. We submit that this was not proper cross-examination. That cross-examination should be

confined to matters brought out in the direct and that a defendant on the witness stand can not be cross-examined as to collateral matters about which he has not testified at all in his direct.

It is true that in some cases the Court has a certain discretion in permitting a cros sexamination to extend beyond the fair purview of the direct.

Since it is ordinarily the mere matter order of proof.

Santy vs. U. S., 117 Fed. 132.

But in a criminal case where the defendant himself is on the stand the rule is different he only subjects himself to a fair cross-examination and anything more than that is prejudical and reversible error.

People vs. McGungill, 41 Cal. 431.

People vs. Rodriquez (Cal.) 66 Pac. 174.

Error in refusing to charge as follows:

'EVEN IF YOU SHOULD FIND THAT SOME ONE OF THE DEFENDANTS INTENDED TO SUBORN PERJURY, OR EVEN DID SO, THIS WOULD NOT JUSTIFY A CONVICTION OF THE CHARGE IN THIS INDICTMENT UNLESS YOU FURTHER FIND THAT TWO OR MORE OF THESE DEFENDANTS DEFINITELY PLANNED AND AGREED AMONG THEMSELVES TO PROCURE THE ALLEGED PERJURY."

There was evidence in this case which was admitted against Gesner alone, as for example, letters written by him (see record pages 485), and evidence of numerous witnesses like that of Ben Jones (see record page 163), which in its direct effect at least involved only one defendant. For illustration of testimoney of such other witnesses see pages 1322-1323-1825 of the record.

Hence the propriety of the above request in order that the jury should not get confused as to the issue and find a verdict of guilty against all, if they thought that some one of the defendants intnded the subornation of perjury, and that the others were involved in a plan to secure land without having agreed with any one that perjury should be suborned.

A definite *agreement* of some kind, either tacit or expressed between the conspirators, is the very essence of this crime.

U. S. Martin, 4 Clifford 163.

Pettibone vs. U. S., 148 U. S. 197.

4 *Elliot on Ev.,* Sec. 2926.

It is true that this agreement need not be a formal one or expressed in words, and the jury may infer it from circumstances,

but in *some form* the agreement and preconcerted action must exist. Here the defendants were strenuously contending that there was no such agreement in any way or form, and while there was evidence no doubt from which a jury might infer such agreement, yet the defendants were surely entitled to have them fully informed in language which they could not misunderstand, that some kind of a definite agreement between the parties was the essence of this offense. The offense is a peculiar one—it is the preconcerted agreement, not the act, and joint action without the agreement will not make the offense.

Clifford vs. Brandon, 2 Champbell 358.
Newall vs. Jenkins, 26 Pa. St. 160.
Rex. vs. Pywell, 1 Starkie 402; 2 E. C. L. 156.

An error of a somewhat similar nature was committed in refusing the following instruction:

"EVEN IF YOU FIND THAT PERJURY WAS COMMITTED BY SOME ONE OR MORE OF THE APPLICANTS IN QUESTION THAT WOULD NOT JUSTIFY A VERDICT OF GUILTY, UNLESS YOU FURTHER FIND THAT AT LEAST TWO OF THE DEFENDANTS CONSPIRED AND AGREED TOGETHER TO PROCURE THE PERJURY TO BE COMMITTED.

Referring again to the testimony of Ben Jones, one might believe that he committed perjury, and that neither Williamson or Biggs ever conspired to suborn perjury, or that they had any idea that perjury would be committed.

And the jury might have believed from the evidence that even if Gesner knew that Jones would commit perjury that he was not in a conspiracy with any one to suborn perjury.

It is manifest that this is a case where there was a great

probability that the jury might be confusel as to the real issue and convict upon collateral matters.

There was error in refusing to charge the jury as follows:

"THE DEFENDANTS ARE NOT CHARGED WITH DEFRAUDING OR ATTEMPTING TO DEFRAUD THE GOVERNMENT, AND THEREFORE ANY MERE ATTEMPT TO EVADE THE LAW ON THEIR PART (IF THERE WAS ANY SUCH ATTEMPT) WOULD NOT JUSTIFY A VERDICT OF GUILTY UNLESS THERE WAS ACTUALLY AN AGREEMENT AND CONSPIRACY AMONG THEMSELVES TO PROCURE PERJURY."

It is to be born in mind here that under the charge in the indictment the object of the conspiracy was to suborn perjury, not to acquire title to a portion of the government domain by fraudulent entries.

The natural ultimate object of a conspiracy involving matters of this kind would be to acquire land, and the testimony of all the applicants tended in this direction rather than to show that the ultimate object was a conspiracy to suborn perjury.

(See 328-288, 353-381, 389-416, 1141-1244, 1516-, 1362, 1468-, 162-, 1889-, 293-, 551- of the record containing the testimony of nineteen persons mentioned in the overt acts charged in the indictment, page 14-21 of the record.)

It is manifest that no general statement of the law would be sufficient to warn the jury and hold them to the issue. It was necessary that they should be told directly and positively that a mere attempt to evade the law did not constitute the offense charged.

There was error in refusing the request to charge as follows:

"THE CHARGE IN THIS INDICTMENT IS THAT THE OATHS OF THE APPLICANTS IN QUESTION WERE INTENDED TO BE FALSE IN THE MATTER OF THE ALLEGED CONTRACT TO CONVEY TO VAN GESNER AND WILLIAMSON, AND YOU MUST BASE YOUR FINDINGS ON THAT CHARGE ALONE."

The refusal to charge as above requested merits a comment of a like nature as those above.

There was error in refusing to charge as follows:

"EVEN IF YOU SHOULD BELIEVE, THEREFORE, THAT THE APPLICANTS, OR SOME OF THEM, WERE INACCURATE OR TESTIFIED FALSELY AS TO WHERE OR HOW THEY OBTAINED THE MONEY TO PROVE UP ON THEIR CLAIMS THAT ALONE WOULD NOT BE SUFFICIENT TO SUSTAIN A VERDICT OF GUILTY IN THIS CASE."

It will be remembered that the government was permitted to offer evidence tending to show that the lands were not subject to entry; that there was no timber upon the different claims. The government was also allowed to offer evidence tending to show that the money with which to prove up wasobtained by some of the applicants in a different manner from that which wa testified by them.

(See page — —of the record.)

Hence the propriety of the above request.

THE INDICTMENT DOES NOT CHARGE THAT EITHER DEFENDANT WILLIAMSON OR GESNER DID ANY OVERT ACT; HENCE THE COURT COMMITTED MANIFEST ERROR IN CHARGING THE JURY AS FOLLOWS:

"The offense is sufficiently proved if the jury is satisfied from the evidence, beyond a reasonable doubt, that two or more of the parties charged, in any manner or through any contrivance positively or tactitly came to a mutual understanding to accomplish a common and unlawful design, followed by some act done by *any one of the parties* for the purpose of carrying it into execution."

To warrant a conviction it must appear (1) that a conspiracy existed as charged in the indictment, (2) that if such conspiracy existed the *overt act charged* was committed in furtherance of such conspiracy, and (3) that the defendant was one of the conspirators.

United States vs. Cassidy, 67 Fed. Rep. 698.

United States vs. Newton, 52 Fed. Rep. 275.

United Statse vs. Goldberg, 7 Bliss (U. S.) 175.

It is a question for the jury to determine whether any one of the acts, alleged to have been done to effect the object of the conspiracy, was actually committed, and if so whether it was done to effect the object of the conspiracy. See

United States vs. Sanche, 7 Fed. 715.

The instruction complained of was not modified by other instructions given, but to the contrary, it was several times stated

to the jury i effect that in so far as the overt act was concerned it was sufficient if any one of the defendants did anything to effect the object of the conspiracy.

Apart from any authority, it is manifest that the government must prove its case as alleged in the indictment, and that there could be no proper conviction of any of the defendants upon proof of the conspiracy charged and proof of an overt act other than one alleged in the indictment, whether such overt act was committed by a person alleged to have committed some overt act or by a defendant who was not alleged to have committed an overt act. The indictment charges that the defendant Biggs committed several overt acts, but it charges no overt act against any other defendant. The jury might have based a conviction upon an overt act done by the defendant Williamson, or by an overt act done by the defendant Gesner. They might have thought that Gesner did an act to effect the object of the conspiracy.

They might have believed the evidence of Ben Jones when he testified that (see page 168 of the record) Gesner asked him and wife to take up a claim, and that this was an act done t effect the object of the conspiracy.

The jury might have believed the evidence of each applicant who talked with Gesner and found from such evidence that Gesner committed a number of overt acts.

See pages 162 of the record.

The jury might have believed the testimony of John Watkins when he testified, see page 296 of record, that Williamson wrote the description of the land to be entered in a book and that such act was in furtherance of the conspiracy.

In fact there is just as much reason to believe that the jur based their verdict on an overt act committed by Williamson or

by Gesner as that they based a verdict upon an overt act alleged in the indictment. The chances are at least two to one against the jury's basing its verdict upon an overt act alleged. There was considerable evidence to the effect that Biggs told the applicants that they could properly take the oath required of them when they were applying to enter the land. We submit that these plaintiffs in error are entitled to a trial of their case according to the rules of law, and that the instruction complained of is a plain violation of their legal right.

ERROR IN PERMITTING THE INTRODUCTION OF EVIDENCE TENDING TO IMPEACH THE WITNESS BRANTON BY SHOWING CONTRADICTING STATEMENTS AS TO COLLATERAL AND IMMATERIAL MATTERS.

This witness was a very important witness for the defendants. He was the only one of all the witnesses who talked with Gesner about taking land, who had not himself applied. He was not under fear of indictment himself. The government could not claim that he had been guilty of perjury in the matter, for he had made no application at all. All the witness agreed that he was present and his testimony entirely corroborated Gesner.

The prosecution was permitted to impeach him by showing alleged contradictory statements as to an entirely immaterial matter about which he had not testified at all in his direct.

It was made to appear in cross-examination that a day or two before the talk with Gesner, he was traveling through the county and stopped at the place of one Adams. Being asked by the prosecuting attorney where he was going, he said he was on his way to Vale, which is in the extreme eastern part of the State of Oregon and not a great distance from the Idaho line.

The prosecution was then permitted to ask him if he had not stated that he was going to Idaho and he, having denied making such a statement, to impeach him by calling two witnesses to contradict him by showing that he had.

The only foundation laid for the impeachment of this witness in this matter was as follows.

"Q. I thought you were on your way to Idaho, wasn't you?

A. When I met Campbell Duncan?

Q. Yes.

A. No, sir, I was not.

Q. Did you say you were?

A. I did not.

Q. Didn't you tell him that?

A. I did not.

Q. Didn't tell anybody that?

A. I did not.

Q. How did you come to go to Campbell Duncan's house?

A. I was on my way to Vale, Ore., in the eastern part of the state. I had a younger brother there by the name of Fred, and he wanted me to come out to where he was located, and I stated at the time, I thought I would go up there, and I came along where Campbell was living."

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The impeachment by Adams was as follows:

"Thereafter, one William Adams was called as a witness, and after testifying that he had a ranch near Prineville, where Campbell Duncan was working, and that the witness Branton came along there in June, 1902, was asked the following question:

"Well, did he state to you that he was going to Idaho at that time?"

To which defendants objected as incompetent and not proper impeaching question, and no proper foundation laid for it, but the objection was overruled and the defendants excepted, whereupon the witness answered:

"Yes, sir."

Thereupon the following questions were asked:

Q. At the time of the conversation, I refer, was this man Branton there at your place?

A. Yes, sir.

Q. How long was he there?

A. Three nights and days.

Q. I a mtalking about the time he camped there. Did he then state to you that he was going to Idaho?

To which question the defendant objected as not a proper impeaching question and no proper foundation laid for it and incompetent, but the objection was overruled and the defendants excepted.

Whereupon the witness answered:

Yes, sir.

Q. Was Duncan present when he said this? Was Cam Duncan present when Branton said it to you?

A. Yes, sir.

Record page 208

The impeachment by Duncan was as follows:

"Thereafter on rebuttal one Campbell Duncan was called as a witness by the government and asked the following question:

Q. Mr. Duncan, when you first saw Clarence Branton—the witness hereinbefore referred to—there (at Adams' ranch) what did he tell you, if anything, as to where he was going?

Objected to by the defendant as not proper rebuttal.

Objection overruled and defendant excepted. Witness answered:

He said he was going to Idaho, on his road there."

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It is well settled that it is error to permit the impeachment of

a witness on such collateral and immaterial matters—if a witness is asked in relation to such matters upon cross-examination his answer is conclusive.

Rapalje on Witnesses, Page 345, sec. 209.

People vs. Kellat, 53 Cal. 65.

Everett vs. Pierce, 59 Cal. 540.

The prosecution also sought to impeach this witness by supposedly contradictory statements made to one Ray in relation to the reason he did not take up a timber claim.

The foundation for this was as follows:

"Q. About one year after you had been up to the timber and in Prineville, didn't you have a conversation with Frank Ray, and didn't you tell him that the reason you did not take a timber claim at that time was because there wasn't enough in it?

A. I don't remember having any conversation with Frank Ray at all regarding the timber.

Q. You will swear you did not say that to him?

A. I am positive that I never met Frank Ray to my knowledge except once from the time that we were up there in the timber until since I came here to Portland at this trial.

Q. When was that once?

A. I met him on the road east and north of Prineville. I don't remember the name of the stream he was on, but I was going to look after some horses I had, and I met Frank Ray, if I remember right, and I might possibly mistaken in meeting him there; it might have been in May or June, 1903.

Q. Did you tell him on that occasion at that place that the

reason you did not take a timber claim, referring to the time you went up there, when Dr. Gesner was there, was because there wasn't enough in it for you?

A. No, sir; I did not.

Q. Or that in substance?

A. No, sir."

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"And thereafter, one Frank Ray was called as a witness, and having testified that he met the witness Branton on the road east and north of Prineville, in May or June, 1903, was asked the following question:

And on that occasion, did he say to you that the reason he did not take up a timber claim at that time that he was up there at the shearing plant was because there wasn't enough in it, or words to that effect?"

To which question the defendants objected upon the ground that there was no proper foundation for impeachment, and also that the circumstances for time, place, and persons present, were not called to the attention of the witness Branton while he was on the stand, but the objection was overruled, to which ruling defendants expected and their exception was allowed. Thereupon the witness answered:

"Yes, sir."

There was no foundation for the foregoing impeachment question, except as hereinbefore set forth, in relation to the cross-examination of the witness Branton." Record page 1252

It will be observed that the conversation was not shown to have occurred at the time referred to by Branton. Branton did not remember having any talk with him at the time he referred to. The places were not fully identified as the same. ~~The one referred to by Branton was on the road east and north of Prineville~~

and that about which Ray was asked on the road *north* from that place. There was nothing to show that they were on the same roads or that it was the same meeting and the time was but little more definitely fixed. The conversation related by Ray, if it took place at all, might have been and probably was at some other time than the one remembered by Branton. The rule which requires time, place and persons present to be pointed out definitly so as to fully inform the witness of the time referred to and to refresh his memory in relation thereto is well established.

Rapalje on Witnesses, page 338, Sec. 203, and authorities cited.

In conclusion, we submit that the Court below clearly erred.

1st. In holding that the indictment was sufficient.

2nd. In holding that the indictment charged conspiracy to suborn perjury in the matter of final proofs and in admitting testimony thereof and submitting the case to the jury on that theory.

3rd. In permitting the witnesses to state their "understanding" of the transaction with Gesner and their undisclosed intention at the time of their application and final proof.

4th. In charging the jury that the indictment might be sustained by proof of an overt act of *any* of defendants, whereas the the indictment only charges overt acts of Defendant Biggs.

5th. In refusing to instruct the jury that there must be, in some form ,a definite agrement or concert of action between the parties to make conspiracy, and that a simple intent to evade the provisions of the timber law would not sustain the indictment.

6th. In admitting evidence of distinct offenses against the state of Oregon in the matter of school lands.

7th. In permitting the witness Branton to be impeached as to collateral and immaterial matters.

There are numerous other errors of which we complain, some of which we have noticed in this brief, but these seem to us so clear and plain as to show that the defendant did not have a trial according to the rules of law. Of course, we have no right to ask this Court to pass upon their guilt or innocence, but we do have a right to ask that their trial be based upon the assumption of innocence and that all the safeguards of innocence provided by law be applied.

Respectfully submitted,

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